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ABSTRACT

Using as examples some of the more important court cases from the 1970s, as well as a few older but still important cases, this book discusses tort litigation as it affects educators. Chapter 1 presents all of the elements important to educational tort law and discusses tort terminology as well as events commonly occurring in tort actions. With the exception of the last chapter, the rest of the book examines educational tort suits arranged by topic. Chapter 2 deals with inschool injuries while chapter 3 examines injuries occuring away from school. Chapters 4 and 5 deal with specialized classes and athletics, from which come the preponderance of tort suits. Chapter 6 reviews cases concerning corporal punishment or assault and battery, while chapter 7 looks at several cases involving defamation of character. The malpractice suits presented in chapter 8 are very new but according to the author may be the most damaging of all tort suits in education. Chapter 9 summarizes all that goes before and presents some advice to educators on how to avoid tort litigation. Appendices list the relevant cases in alphabetical and subject order. (Author/PGD)

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Educational Tort Liability and Malpractice

by

Eugene T. Connors
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I wish to dedicate this book to
four of my college professors:
Dr. Kern Alexander
Dr. William Mahaney
Dr. Robert Shed
Dr. Richard Vacca.

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Preface

It is not my intent in this book to frighten educators; but we do live in a litigious society, and educators, as public servants, are increasingly frequent targets of litigation. Pupils and parents are suing educators for a variety of reasons, including negligence, assault and battery, defamation, and malpractice. Upon reading this book, a teacher might say, "Is the risk of suit, and of losing a suit, so great that I should consider leaving the profession?" I don't think so. Educators have won a very large proportion of the suits brought against them. Thus there is no valid reason to become legally gun-shy. However, this does not mean that educators can get away with carelessness. This book is filled with cases involving charges of carelessness.

My purpose is to enlighten teachers, principals, superintendents, and school board members about the complexities of educational tort law. Hopefully, this book will also make educators more aware of their legal liability for pupil safety. Protecting pupil welfare should become habitual, and this habit will protect educators as well as pupils.

I am frequently asked how many teachers are sued every year in the U.S. I have no exact answer. There is apparently no published source that provides an accurate accounting of tort liability suits against educators. However, I can make a reasonable guess. The tort cases reported in law books are only those that have been appealed from a trial court. Obviously, this is a small percentage. I estimate that one-third of the suits brought against educators are settled out of court in the U.S., because the teachers were so obviously negligent that the insurance companies involved did not want to face juries. I also estimate that approximately one-third of the suits brought against educators are routinely dismissed by trial judges as being trivial, because the teachers were obviously not negligent. That leaves about 33% of the suits resulting in jury trials where the issue of negligence is real. Of that number, about one-half are appealed. There are between 200 and 500 appealed cases reported every year; this means that there are probably between 1,200 and 3,000 suits brought against teachers or administrators every year. Even though I estimate that only one-third of that number are decided by the juries, there is still a great amount of litigation.

Conflicting verdicts by juries may tend to confuse readers of this book. But inconsistency is inherent in the jury system. About the only consistent aspect of tort law is the inconsistency of juries. A variety of factors contribute to this problem. The age of the pupil who is injured, the skill of the attorneys representing the litigants, and the trial judge's instructions to the jury all sway jury opinions. I cite cases in this book where the evidence shows that the educators involved were clearly innocent, yet juries found them negligent anyway. Of course the opposite is sometimes true. That is why so many of the cases presented in this book were appealed to higher courts.

The cases I describe here represent a very small fraction of all the education tort cases brought to court. I have chosen some of the more interesting and important cases from the 1970s, as well as a few "classic" older but still important cases.

The book is arranged in a fashion that will, I believe, enhance understanding of a very complicated topic. Chapter I presents all of the elements important to educational tort law. It discusses tort terminology as well as events that usually occur in a tort action. With the exception of the last chapter, the rest of the book examines educational tort suits arranged by topic. Chapter II deals with injuries of the in-school type, while Chapter III examines injuries occurring away from school. Chapters IV and V deal with specialized classes and athletics from which come a preponderance of tort suits. Chapter VI reviews corporal punishment/assault and battery cases, while Chapter VII looks at the interesting cases concerning defamation of character. The suits presented in Chapter VIII (malpractice) are very new but may be the most damaging of all tort suits in education. Chapter IX summarizes all that goes before, and presents some advice to educators on how to avoid tort litigation.

As in any project this size, numerous people aided the author. I must extend my appreciation to the University of Virginia Law Library and its excellent staff. They were most helpful in the research for this book. A very deep expression of thanks goes to my department secretary, Judy Myers, for her excellent typing and editing. Without her help, every other word in this book would be misspelled. Derek Burleson, Stanley Elam, and Christine Swanson at Phi Delta Kappa were most helpful with their editing suggestions. Last to mention but first in mind, my wife, Lola Connors, deserves special thanks for her patience, understanding, and support. There were many instances when she quietly allowed me to watch football games on television when I should have been working on this book.

Eugene T. Connors
April 1981

I

Tort Liability: When Is an Educator Negligent?

Tort liability may be, even for lawyers, one of the most complex and difficult fields in law. In spite of this, educators need to be aware of tort law in order to protect themselves against a variety of lawsuits. Parents of school children are much more apt to sue educators for tort liability than ever before. The very nature of education exposes its employees to higher than average tort hazards. These hazards can easily result in pupil injuries and, consequently, in lawsuits. This chapter is not intended to substitute for a law school course in tort law or the reading of Prosser's *Law of Torts*.[1] However, it is intended to state the complexities of tort law in an understandable and useful way for educators.

Tort: What Is It?

Unfortunately, no one has ever produced a truly clear definition of "tort." The continuing evolution of tort law makes definition difficult at best. However, legal scholars have attempted definitions, and here is what some of them say:

> Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.[2]
>
> A tort is an act or omission which unlawfully violates a person's right created by the law, and for which the appropriate remedy is a common law action for damages by the injured person.[3]
>
> ...an act or omission, not a mere breach of contract, and producing injury to another, in the absence of any existing lawful relation of which such act or omission is a natural outgrowth or incident.[4]

Perhaps William Prosser's approach to definition is best, when he states what is *not* a tort:

10

Tort Liability

> It might be possible to define a tort by enumerating the things that it is not. It is not crime, it is not breach of contract, it is not necessarily concerned with property rights or problems of government, but is the occupant of a large residuary field remaining if these are taken out of the law.[5]

Basically, a tort is any civil wrong independent of contract. Tort law is very old, having evolved during the Middle Ages. The word "tort" is derived from the Latin word *tortus*, which means twisted. The French words *tortu* (twisted or crooked) and *tort* (wrong) show the evolution of tort into its current legal definition.

Until modern times, "tort" was frequently substituted for "wrong" in the English language as well.[6] Tort, then, is derived from actions which are twisted, crooked, or wrong. Tort law developed when individuals sought to recover damages caused by some twisted or wrong act. In the Middle Ages, if Party A injured Party B, Party A was required under law to make the injured party whole again. Assume that he blinded Party B. Obviously, it was unlikely that he could restore one's eyesight; however, the law required that Party B be compensated, usually in money, for his loss.

As far as educators are concerned, a tort is any civil wrong, independent of contract, that leads to student injuries (physical, mental, and reputation) or reduces the "value" of a pupil by failing to provide a quality education. For educators, then, the law of tort liability falls into the areas of pupil injuries (physical and mental), defamation of character, and educational malpractice.

Tort law affects education in three major areas. The first area is physical injury, not only to pupils but to employees and the public as well. A substantial number of cases involve injuries to pupils while on school property or while under the jurisdiction of the school. However, there are also a great many cases where teachers, cafeteria workers, janitors, school bus drivers, and others have also been injured on the job and have sued the school for negligence. The public may also bring suit. Spectators injured at school football and basketball games may sue the school, as may parents coming to PTA meetings who fall on icy school sidewalks.

A second major area where tort affects educators is defamation of character. Defamation is more commonly known as slander or libel. There is a body of case law involving pupils who have sued the school system, the teacher, or both for defaming the good character and the good name of the student. The cases usually involve the use of pupil records for employment purposes. There are also a number of cases in which teachers have sued their superiors for giving poor recommendations or bad evaluations.

The third area where tort affects education is a relatively new one: educational malpractice. In general, two kinds of suits come out of the malpractice area. The first involves student competence. Suits of this kind are brought by students who have been awarded a diploma by the school system, yet are functionally illiterate. When they find it difficult to live in society without certain skills supposedly taught in school, they attempt to sue the school system and its teachers for educational malpractice. In essence, their suits charge that since they hold a high school diploma it should certify that they possess skills to function in our society. Lack of these skills warrants suit for educational malpractice, they claim.

The second kind of malpractice suit arises out of Public Law 94-142, the Education for All Handicapped Children Act. These suits are brought when a child has been misdiagnosed as handicapped or when a disability is mistreated and the child receives a highly inappropriate education. These children (or their parents) are suing on the premise that misapplication of education is educational malpractice.

Basically, there are two types of torts in education: ***intentional interference*** and ***negligence***. While other areas of tort law exist—e.g., trespass, conversion, misrepresentation, and economic interference—educators are primarily concerned with intentional tort and negligence.

It may be appropriate at this time to repeat that a tort is not a crime. While in many instances torts are associated with crimes (injuries occurring during the commission of crimes), they are separate from criminal prosecution. In criminal matters the state is simply attempting to protect and/or vindicate the public interest through some type of punishment (fines, imprisonment, death). However, criminal law does nothing towards restitution of the injured party. This restitution must be done in civil tort proceedings.

> A criminal prosecution is not concerned in any way with compensation of the injured individual against whom the crime is committed, and his only part in it is that of an accuser and a witness for the state. So far as the criminal law is concerned, he will leave the courtroom empty-handed.[7]

In early American courts, actions involving both torts and criminal matters had to be separated. This practice stemmed from the English law that required tort actions to wait until the criminal proceedings were completed. This law was apparently based on "some notion of a policy of compelling the injured party to prefer criminal charges and bring major offenders to justice."[8] The same court conducted both proceedings, and this eventually led to the merging of terms such as "assault," "battery," and "libel." However, in recent times tort actions and criminal cases have grown apart into two distinctly separate fields with only similar use of terms in common.

A tort, also, does not involve matters of a constitutional nature. Plaintiffs whose basic constitutional rights are violated do not sue in tort actions. Instead, such actions are usually taken into federal courts, frequently in the form of "1983" actions.[9]

Intentional Interference

Intentional interference (often called intentional tort) is a civil wrong because of the intent of the responsible party. There must be voluntary intent to do some act that interferes with another person. The intent is not necessarily hostile or directed at doing harm. It is the effect of the intent that makes it a tort. If an injury resulted from a practical joke, there was no intent to harm. However, there was an intent to *interfere*, and an injury resulted from this intentional interference. Therefore, the practical joke is intentional interference. A store that accidentally locks a customer in its building for a night also commits intentional interference. While the intent is to keep people out of the store, the effect is that someone is locked in. So injuries can result from accidents where the intent is directed at some other purpose. The intent is voluntary and the accident or injury is not necessarily part of the intent, yet the resultant injury was caused (ultimately) by the intent.

Basically, there are four types of intentional tort: 1) assault, 2) battery, 3) false imprisonment, and 4) mental anguish.

Assault and battery. Criminal assault and battery are quite different from tort assault and battery. Criminal law is derived from the older tort law and, during its development, has come to use the terms assault and battery as well. An assault, in its present sense, is still a nonphysical threat. However, in most states criminal laws were adopted in such a manner that there is little or no difference between an assault and a battery.

If someone were mugged in Central Park in New York City, the mugger would be arrested by the police for felonious assault and battery. If this person were found guilty, he could be sentenced to jail, or fined, or both. However, the party who was mugged and incurred medical expenses as a result of the mugging leaves the trial empty-handed. This is where tort law takes over. The injured party could then bring tort assault and battery suit against the mugger to recover damages. An old English law required that before any tort actions could be brought against an alleged criminal, the criminal trial must be completed. This was an attempt at keeping the injured party from recovering damages and then refusing to testify at the criminal proceedings. Some states have adopted this tradition; others have tried to adopt some type of compensation program for victims of criminal assaults (thus bringing the two legal systems closer together).

Technically, a tort assault is putting someone in fear of bodily harm, i.e., making a threat. In its criminal counterpart there is physical harm. Thus tort assault is a mental as opposed to a physical injury. Assaults do not have to be verbal; threatening a person by shaking a fist can also constitute an assault.

> Since assault, as distinguished from battery, is essentially a mental rather than a physical invasion, it follows that the damages recoverable for it are those for the plaintiff's mental disturbance, including fright, humiliation, and the like, as well as any physical illness which may result from them. The establishment of the technical cause of action, even without proof of any harm, entitles the plaintiff to vindication of his legal right by an award of nominal damages.[10]
>
> Unlike assault, battery is the physical damage of a person. Not only does battery involve physical harm to the body but anything identified with it. Therefore, not only is a physical attack on someone a battery, but so too is contact with a person's clothing, coat (held in the hand), or chair (sat upon).[11]

As in other areas of tort law, the battery does not have to be a direct result of an intended act. A person could dig a hole for A to fall into, but B, upon falling into it, can sue for battery even though the intent was not to harm B. It is the result that is important.

Several courts have held that since battery is the worst kind of intentional interference, punitive damages may be awarded in battery cases. Punitive (punishing) damages are awarded to the injured party over and above compensatory damages. Presumably, paying punitive damages will "teach the defendant a lesson."

As Prosser states, "Assault and battery go together like ham and eggs."[12] In most normal circumstances, both intentional interferences are present. The two terms have become synonymous with each other as a result of some poorly constructed state criminal laws, where a battery automatically constitutes an assault and vice versa. However, one may exist without the other. For example, if a person is shot at and missed, an assault has occurred; if a person is struck in his sleep, a battery has occurred.[13]

In education a fair number of assault and battery cases arise from the use of corporal punishment. Frequently, pupils who have been punished in a corporal fashion bring an assault and battery suit against the teacher who administered this punishment. Such suits are usually not successful unless there was "excessive" corporal punishment.

In determining whether an assault and battery charge can be sustained, the courts generally look for such factors as

1. the severity of the offense,
2. the pupil's previous record of conduct,
3. the size of the pupil and the size of the disciplinarian,
4. the sex of the pupil,
5. how many times an infraction was committed,
6. the age of the pupil,
7. what instrument was used in applying corporal punishment, and
8. where the corporal punishment was applied.

Some courts have stated that the mental condition of the disciplinarian should affect whether an assault and battery charge is substantiated. These courts have held that anger of the disciplinarian alone constitutes excessive corporal punishment and that damages may be recovered for assault and battery.

False imprisonment. False imprisonment, sometimes called false arrest, occurs when a person is illegally detained against his or her will. Prosser points out that "'imprisonment' while it seems originally to have meant stone walls and iron bars, no longer signifies incarceration; the plaintiff may be imprisoned when his movements are restrained in the open street, or in a traveling automobile, or when he is confined to an entire city, or is compelled to go along with the defendant."[14]

However, for someone to be falsely imprisoned, the confinement must be total as opposed to partial. Therefore, leaving one an escape route in another direction or shutting one "in a room with a reasonable exit open" does not constitute false imprisonment.[15]

When false imprisonment occurs, the plaintiff is always entitled to damages, although they may be nominal. Compensation for loss of time, physical discomfort, physical harm or illness, or mere inconvenience can be awarded in false imprisonment cases.[16]

Imprisonment can take many forms. Restraint can be imposed in the form of barriers, physical binding, or threats used to intimidate a potential prisoner into submission. The legal standing of the person doing the imprisonment can also vary. False imprisonment suits have been filed against police officers, security guards, store managers—and educators. The imprisonment does not even have to be intentional. The store or school that locks its doors to keep people out and subsequently falsely imprisons someone is liable, even though imprisonment was not the intent.

In education we frequently use detention as a form of punishment. Detention, in itself, is not false imprisonment. Occasionally, there is the sad instance of a young pupil being locked in a closet by a teacher and forgotten. This is an obvious case of false imprisonment. Children have been substantially injured by being left in closets; there are even cases where they have died.

Another aspect of detention that needs to be considered is the age of the child. If the child is very young, detention may not be appropriate punishment, because the child may have difficulty in getting home. In a rural setting this can happen even with older students, because they may live 20 miles or more from the school, and if detained after school, they may have no way of getting home. When a pupil in such circumstances is injured on the way home, the teacher who kept him after school may be liable for damages.

Mental distress. Mental distress, frequently called mental anguish, is an area of intentional interference that the courts have been reluctant to endorse. Only since the early 1900s have courts sustained action for damages based on mental distress alone. Prior to this century, mental distress went hand-in-hand with assault cases. With the rise in medical science, discoveries of the effects—often physical—of mental distress, the courts have had to accept this type of tort as being self-sufficient in legal action. Many courts, however, are still reluctant to grant damages for mental distress unless it is tied into some other type of tort. The prior "laying on of hands" (battery) is frequently a prerequisite for mental distress claims.

Negligence

The most common category of tort suit in education is *negligence*. Indeed, almost all of the suits arising out of tort are negligence-related in one way or another. Basically, negligence can be defined as conduct falling below an established standard. There are four elements of negligence: 1) standard of care, 2) unreasonable risk, 3) proximate cause, and 4) actual injury.

Standard of care. The courts have held that educators have the duty to provide an appropriate standard or duty of care for their pupils. Standards vary among occupations. Practitioners in certain service fields—for example, policemen, firemen, doctors, and educators—are expected to provide a higher standard of care than the average citizen in dealing with persons in their charge. Even within education there are differences. Certain kinds of teachers have a higher standard of care than others. Early childhood teachers have a higher standard because of the very young age of the children they teach. Physical education teachers have a higher standard because of the inherent danger in various exercises and physical education techniques. Vocational and industrial arts teachers also have a higher standard of care because of the injuries that can occur when students use various kinds of machinery and tools.

Standard of care is closely related to supervision. The higher the standard of care, the more specific and constant the scope of supervision. The average teacher has what is called general supervisory responsibilities. He or she is expected to exercise a general and reasonable standard of care over pupils. However, teachers in the areas of early childhood education, physical education, and vocational education are expected to adhere to a higher standard. These teachers are expected to provide a much more specific and constant level of supervision over their pupils than the general supervision provided by the regular classroom teacher.

Unreasonable risk. The second element of negligence is unreasonable risk. The courts have held that educators have the duty to protect their pupils from an unreasonable risk. The unreasonable risk of a situation is closely linked to what is called the "Reasonable Man" doctrine (which will be discussed shortly). Educators should not place their pupils in circumstances that lead to an unreasonable risk. For instance, it would be unreasonable to expect kindergarten children to cross a busy intersection by themselves. A teacher who allows this has invited unreasonable risk. Football players who go onto the field with defective equipment are being subjected to an unreasonable risk by the coach. The courts will hold that educators may allow pupils to assume a reasonable risk. For instance, pupils who participate in athletics understand that there is a chance that they may be injured in this participation. However, it is assumed that they have received the best possible instruction, that proper coaching techniques are being employed, and that the best possible equipment is used. Anything less and the risk becomes unreasonable.

Proximate cause. The third element of negligence is proximate cause. This is a complex legal principle. In essence, proximate cause is the sequential connection between the teacher's negligent conduct and injury to the pupil. The teacher's conduct does not have to be the *direct* cause of injury; it is not necessarily even the *indirect* cause. It has to be the *proximate*—closely related in time, space, or order—cause of injury.

The classic type of proximate cause in education is lack of supervision. For example, if the teacher had been on recess duty as she was supposed to be, would the injury have occurred? There have been many cases in which this situation has been the basis of a negligence suit. Let us look at an example in order to clarify this legal principle. Assume that the teacher was absent from recess duty even though she was assigned to be there. During her absence two pupils became involved in a fight, and one knocked the other to the ground, causing serious injury. Whose actions were the proximate cause of injury? Obviously, the pupil who knocked the other down was the direct cause. However, many courts (or juries) in this country will find the teacher's absence from the recess yard to be the proximate cause of injury, reasoning that the injury might not have occurred if there had been adequate and proper supervision by the teacher.

Actual injury. The fourth element of negligence is actual injury, meaning real and substantial injury. Tort law is not concerned with the broken arm that mends quickly or the cut that requires a few stitches. These are minor injuries. But it is not uncommon in reading educational tort cases to learn of pupils who were blinded or maimed, whose arms and legs were cut off, or who were paralyzed or brain-damaged as a result of injuries sustained in school. Some have been killed.

For a teacher to be negligent, all four of the elements of negligence must be present. The court then attempts to determine whether the teacher acted in a reasonable fashion.

"Reasonable Man" Doctrine and Foreseeability

In determining whether the teacher acted "reasonably" in a negligence suit, courts have developed the "Reasonable Man" doctrine. The teacher's actions are compared to those of a "reasonable man" in the same circumstances. Four elements are considered in comparing the teachers and the hypothetical reasonable man: intelligence, physical attributes, perception and memory, and special skills.

When the element of intelligence is considered, the courts assume that a teacher is of at least average intelligence. The second element, physical attributes, is particularly important. The reasonable person will possess the same physical attributes as the teacher (although the courts will not hold a small female teacher to the same standard in the case of physical strength as a six-foot-six football coach). The third element considered by the courts assumes that the reasonable man possesses normal perception and memory, with knowledge and experience commensurate with others in the community. The teacher should meet the community norm in these respects, according to the courts. The fourth element is that the teacher possesses the special skills and knowledge possessed by others in the same profession. This means that, for example, the physical education instructor is expected to possess all the skills and knowledge other physical education instructors have, and will, therefore, be held accountable for any special skills or knowledge that he/she claims to possess.

The court seeks to determine whether this reasonable person could have "foreseen" the accident that occurred. This is called the Doctrine of Foreseeability. Actions of the hypothetical reasonable person are compared with actions of the teacher. If the reasonable person could have foreseen the injury, then he/she would have taken steps to prevent it. The teacher's action is compared with these actions. If the teacher acted reasonably, then he/she is not negligent.

Perhaps the element of foreseeability is the real key to negligence suits in education. Would not the reasonable teacher be able to foresee a pupil being injured in class if he or she were out of the classroom? Also, would not the reasonable football coach be able to foresee a pupil sustaining injury when he knows that he sent the pupil onto the football field with defective equipment? Would not the reasonable vocational teacher be able to foresee a student injury in his shop if he knew that the blade guard was not on the saw? Would not the reasonable administrator be able to foresee a student falling where stairwell steps are crumbling or where the snow is not shoveled from the sidewalk?

Three Obligations of an Educator

The courts have said that educators have these obligations to their pupils: 1) adequate supervision, 2) proper instruction, and 3) maintenance of equipment.

Adequate supervision, as stated before, is tied very closely with the standard of care. In K-12 schools at least, the courts have held that teachers stand *in loco parentis*, which means in the place of the parent. When children are in school, educators are expected to exercise the same standard of care that a parent would exercise. For most teachers, adequate supervision means general supervision. However, for those teachers who are in the three high standard-of-care categories, adequate supervision means something much more specific and constant. For example, the average twelfth-grade English teacher has a very general and routine standard of care. Adequate supervision for this teacher would mean his or her presence in the classroom and the exercise of prudent judgment. However, adequate supervision for a kindergarten teacher is much more intense. The teacher should never leave the classroom, should be constantly aware of dangerous circumstances in the classroom, and should be constantly supervising all of the children.

The second of the three obligations that educators owe pupils is proper instruction. It appears in two kinds of negligence suits. The newest type involves educational malpractice: teachers failing to instruct pupils properly in the rudiments of reading, writing, and arithmetic. Malpractice will be discussed in a later chapter. Proper instruction is also an element in situations where pupils are injured in physical education, shop, science, and other such classes where specific kinds of instruction need to be given. Was the pupil properly instructed in how to block the other football player? Was the pupil properly instructed in how to dilute acid? The concept of proper instruction can extend to the use of audiovisual equipment. If the pupil is injured while using such equipment, can it be proven that he received proper instruction in how to operate it?

The third element is maintenance of equipment. To avoid danger, educators are responsible for the proper maintenance of all equipment under their control. This is particularly vital in physical education, vocational education, and industrial education. Maintenance should be routine. Also, classroom teachers need to check for unsafe electrical cords, dangerous ceiling lights, broken windows, and the like. The courts will hold teachers responsible if a pupil is injured because equipment has not been properly maintained. This means that educators should develop a schedule or routine for inspecting equipment under their control. Authorities suggest twice-yearly inspections for most equipment. Of course the more often a piece of equipment is used, the more frequently it should be inspected. Under no circumstances should pupils be allowed to use equipment that is defective and potentially dangerous.

Rule of Seven

Another interesting legal doctrine concerning educational tort liability is known as the Rule of Seven. It requires a court to examine pupil age in determining negligence. The courts have long held that pupils from birth to age 7 cannot be considered negligent under the law. They are not legally responsible for their actions, regardless of how grossly reprehensible their actions may be. The 6-year-old who blinds someone with a paper clip and rubber band is not legally responsible for that action. This is why early childhood teachers have such a high standard of care. They are

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responsible for the actions of all the children under 7 years of age. Also, the law will *presume* that pupils aged 8 to 14 are not negligent. Children at this age are assumed not to know better. This assumption may be rebutted, but the burden is on the educator to prove that the pupil *did* know better than to act in such a way as to produce injury. The third category of the Rule of Seven has in the past involved students aged 15 to 21. However, recent legislation at state and federal levels recognizing 18-year-olds as adults has changed the age limitation of this third category to 15-to 18-year olds. Courts have held pupils at these ages to be "possibly negligent."

Obviously, the courts are reluctant to hold a juvenile to the same standards as an adult. In a 1970 case a 17-year-old boy was killed as a result of a fist fight in school.[17] The court would not accept a defense of what is called contributory negligence, saying that while the pupil was almost an adult, he was not an adult and could not be held to the same standards of mature behavior as an adult. Thus pupils between 15 and 18 years of age are held to a higher standard of behavior than 8- to 14-year olds, but not necessarily to that of an adult.

Defenses in Negligence Cases

Five defenses to charges of negligence are available to educators. They are as follows: 1) contributory negligence, 2) comparative negligence, 3) assumption of risk, 4) act of God, and 5) sovereign immunity.

Contributory negligence occurs when the injured party's negligence of his own well-being contributed to his injury. This is the most popular form of defense to negligence charges. However, it is necessary to remember the Rule of Seven. Children between birth and age 7 cannot be guilty of contributory negligence. With pupils between the ages of 8 and 14, the burden is on the educator to prove that the pupil knew better. Technically, pupils can be guilty of contributory negligence, but courts are reluctant to hold juveniles, even if over 15 years old, to be guilty of contributory negligence.

The second defense, comparative negligence, is where more than one person's negligence contributed to the pupil's injury. In any typical tort suit, a good lawyer sues everyone in sight. He sues the teacher, the teacher across the hall, the principal, the superintendent, and the school board. It is frequently true, of course, that more than one person's negligence is responsible for an injury. Where this happens, the court partitions the damages among the negligent parties. Perhaps the teacher is 50% negligent, the principal 30% negligent, and the school board 20% negligent. In such a case, if the court awarded $100,000 in damages, the teacher would have to pay $50,000, the principal $30,000, and the school board $20,000.

The third defense to negligence is assumption of risk. This defense is tied to the concepts of reasonable and unreasonable risk. Pupils may assume a reasonable risk. They do so when they go onto the football field, the baseball field, the basketball courts, or even when they take vocational or industrial arts classes. However, courts assume that pupils have received proper instruction and that they have used the best possible equipment. If the educators involved have failed in either of these two requirements, then the courts will hold that the assumption of risk is not a viable legal defense. More than one court has put another restriction on the assumption of risk as a defense to negligence charges: They have held that pupils cannot assume risks unless they are aware of the risk. This means that educators need to inform pupils of the possibility of being harmed or injured, despite the fact that they are given the best possible instruction and well-maintained equipment. Such notification should be in writing, and the pupils should be made to sign an "understand" form showing that they are aware of the potential risk involved.

The fourth defense to negligence charges is that the injury was an act of God, totally unforeseeable. That is, a reasonable person could not possibly foresee the injury occurring. For instance, it is a bright, sunny day on the baseball diamond. A bolt of lightning strikes and kills a pupil. It is an act of God. There is no way the educator could have prevented it. However, if the baseball coach had seen a thunderstorm rolling in and decided that he could manage one more inning of play, the lightning death would be considered negligence, because he could have foreseen the event. The principal who sees a dead tree next to his school and fails to have it removed is negligent if it falls and injures a child. However, if the tree seems to be perfectly healthy but one day falls on his school, that is an act of God.

The fifth defense is sovereign immunity (sometimes called governmental immunity). It involves the doctrine that a state cannot be sued in the state's courts. At present, eight to 10 states still have sovereign immunity.[18] In these states people cannot sue the school board for acts of tort liability. In most states the doctrine has now been abrogated either by court or by the state general assemblies. In states that retain sovereign immunity, parents can seek damages from the teachers and administrators rather than the school board.

Documentation of Proper Instruction and Maintenance of Equipment

A previous section discussed the three obligations of a teacher: adequate supervision, proper instruction, and maintenance of equipment. When a teacher is sued for negligence, the outcome of the case often hinges upon whether the teacher can prove that proper instruction was given or that equipment had been properly maintained.

Unfortunately, the teacher's word is meaningless in such a situation. And oftentimes pupils (the one injured and/or other pupils in the class) forget about the day when the teacher explained how to use a certain piece of machinery. Educators need more proof of proper instruction and maintenance of equipment than their own word or a pupil's unreliable memory.

There are three ways that educators can protect themselves in these circumstances: documentation, documentation, and documentation! It is vital that the teacher have some dated evidence to prove that proper instruction is given and/or that equipment is properly maintained.

Proper instruction. In order to document proper instruction, the teacher should provide classroom instruction about machinery to be operated or techniques to be employed, then give a written test and go over each test individually with each pupil. The pupils should initial and date missed questions to signify that they understand why they erred. The teacher should keep the tests as part of the documentation of proper instruction.

Next, a checklist should be developed, with each pupil's name along the left side and each piece of machinery (or physical exercise, etc.) along the top. The teacher should demonstrate for the class how to operate a piece of equipment (or do the exercise). Also, the teacher should show pupils what *not* to do. Then each pupil should demonstrate that he or she understands the technique or exercise. As each does this, a check mark will record the fact. This column of the checklist should also be dated.

It has now been documented that the pupils were given proper instruction. They were tested and demonstrated competence. And there is written proof. These records should be kept as long as the pupils are in the class. Finally, teachers should provide adequate review for pupils who are returning to certain classes after summer vacation. This review should also be documented.

Maintenance of equipment. All teachers, but particularly those in vocational and industrial arts, are responsible for proper maintenance of their equipment. This is especially important when pupils use the equipment. Inspections to insure safety of electrical cords, blade guards, solid machinery stands, etc., need to be made at least twice during the normal school year. More frequent checks should be made on specialized equipment. The more a piece of equipment is used, the more frequent the safety checks should be.

Documenting maintenance of equipment is relatively easy. Teachers simply develop a list of all the equipment in their classrooms with safety check dates. After inspecting the equipment, the responsible shop teacher checks the appropriate box and signs the form. A copy should be sent to the appropriate department head, and the teacher keeps a copy as well.

Degrees of Negligence

Teacher negligence is not an all-or-nothing proposition. Courts have recognized varying degrees of negligence since 1704, when an English judge borrowed the concept of degrees of negligence from ancient Roman law.[19] Most modern courts have been forced to accept three degrees of negligence through various state statutes: 1) slight negligence, 2) ordinary negligence, and 3) gross negligence.

Slight negligence is defined as "failure to use great care."[20] In other words, a higher standard of care exists and the educator failed to provide it. Teachers in the three "high standard of care" categories (early childhood teachers, vocational and industrial arts teachers, and physical education teachers) could be found guilty of "slight negligence" if they did not provide that "extra" standard of care required of them.

Ordinary negligence is defined as "a failure to use ordinary care."[21] This means that regular classroom teachers are expected to exercise ordinary prudence and judgment and provide an ordinary standard of care just as the hypothetical reasonable teacher would.

Gross negligence is failing "to use even slight care."[22] To be found guilty of gross negligence, a teacher's performance must be less adequate than that of even a careless person. Some courts, however, have found this definition unmanageable and have therefore created a different definition of gross negligence. They define it as negligence "requiring willful misconduct, or recklessness, or ... utter lack of all care ...."[23] In essence, these courts have placed gross negligence somewhere between plain negligence and intentional interference. There must be a "quasi-intent" to cause harm. The terms "willful," "wanton," and "reckless" enter this description of gross negligence.

Attractive Nuisances

Courts in the U.S. have developed the legal doctrine called "attractive nuisance" in tort cases dealing with trespassing children. A nuisance is "a dangerous, unsafe, or offensive condition which is likely to cause injury, harm, or inconvenience to others."[24] An attractive nuisance is such an unsafe condition that particularly draws children to it. While the child may be trespassing when the injury occurred, many courts will rule that the unsafe situation or condition attracted the child onto the property. Generally, there are four conditions for liability involving attractive nuisances.

1. The person in charge of the school or special area must be aware of the fact that children or young pupils might be likely to trespass.
2. The person in charge knows that such a place or condition involves an unreasonable risk of harm to the trespassing children.
3. The child or young pupil, due to immaturity, is unaware of the potential danger.
4. The usefulness of the attractive nuisance must be associated with its potential for harm. A dangerous machine in a vocational teacher's shop must be important to the class; possession of a highly dangerous nuisance that has little utility increases the probability of a finding of negligence.

Perhaps the classic example of an attractive nuisance is the swimming pool, but there are many attractive nuisances in the schools. The unlocked gym with a trampoline is an attractive nuisance. The unlocked vocational shop is another. The courts have ruled, however, that elementary playground equipment is not an attractive nuisance. There is no inherent danger in playground equipment. It may be advisable for all educators who have potentially dangerous equipment or implements in their classrooms, gyms, shops, etc., to lock them when they are not present.

Selection of an Attorney

Lawyers, like doctors and educators, specialize in some aspect of their profession. Tort law is highly specialized, and the smart educator will seek a specialist in tort law if he or she becomes involved in a tort case.

How can one select a good attorney? Tort lawyers can be referred by one's family lawyer. Friends or colleagues may be able to make recommendations. The state education association's general counsel is often an excellent source of advice. Large law firms almost always have specialists among their partners. But remember, the larger the firm the higher the costs (usually).

Young, inexperienced lawyers frequently lack the practical expertise to represent an educator adequately in a major tort case. Also, before retaining an attorney, one should find out if he or she represents the school board or other potentially conflicting interests--the district's insurance company, for example.

Tort Suits

The legal process involved in tort suits may seem confusing to many educators. While the process may vary slightly from state to state, the procedures described below are fairly typical.

When an educator is sued, the first legal tactic is usually a motion for a summary judgment. Both parties will ask the trial court judge to rule in their favor. Each attorney will present the evidence to the judge (no jury is present at this hearing) and then move for a summary judgment. A judgment for the defense means that there is not enough evidence to find the defendant negligent or that some legal technicality has nullified the evidence. Therefore, the defendant is asking the judge to dismiss the suit. A summary judgment for the plaintiff means that the evidence is overwhelmingly against the defendant and that the judge can find the defendant guilty of negligence as a matter of law (no jury is used). If a trial court judge does enter a summary judgment for the plaintiff, two things can happen: 1) The judge can rule on the amount of damages, or 2) the judge can allow a jury to decide the amount of damages.

If the judge does not enter a summary judgment for either the plaintiff or the defendant, then the question of negligence becomes a jury issue. All the testimony, evidence, etc., must be presented before a jury. This is where the skill and adroitness of an attorney becomes critical. Once each side has presented its case, both lawyers will again ask for a summary judgment for their clients. Assuming the court denies these motions, the trial court judge will instruct the jury regarding the issues of law. The jury is told what constitutes negligence, foreseeability, and whether or not contributory negligence, etc., can be used as a defense. Frequently, the trial judge's instructions to the jury are a primary reason for attorneys to appeal the jury's decision.

The jury then has two considerations. First, is the defendant guilty of negligence? If so, are there any appropriate defenses? And second, if the defendant or defendants are negligent, what amount of damages should be given to the injured party?

Damage awards can be given in a variety of ways. Not only can an injured pupil be awarded damages, but also the parents. Pupils may be awarded compensatory damages (to compensate them for medical expenses, etc.) for past and future expenses, as well as general damages for pain and suffering (past and future). In some states general damages are known as punitive damages—an attempt to punish the negligent party.

Trial judges are given the power to alter a jury's damage award if the judge feels such damages are unfair. When this happens, an appeal is highly likely.

As the cases in this book make clear, any good tort lawyer sues everybody in sight—and always the school board. The reason for suing everybody concerned is quite simple. The more people sued, the greater potential for finding that someone is negligent. It is the old shotgun technique. Also, school boards are usually sued because, as a board, they generally possess much more money than any combination of individual educators. The attempt is to sue the pocket with the most money. Even in states where school boards enjoy sovereign immunity, aggressive lawyers always will name the school board members as defendants in order to give the courts an opportunity to abrogate the board's immunity. Obviously, most people would rather sue the school board than the teachers. But in those states that have sovereign immunity, a plaintiff's best bet is to sue the educator.

Preventive Measures

Release forms. A common procedure that schools have used for years is to require parents to sign "liability release forms" before pupils are permitted to go on field trips or join in extracurricular activities. Only in a very few states are such forms legal (California is one). In most states the forms are legally worthless. A teacher cannot abidcate his or her standard of care of pupils. Basically, these forms imply that no matter how grossly negligent an educator is, the pupil and/or parent cannot sue. Courts will not recognize this proposition. However, the form may deter parents from suing educators if an accident occurs. Also, the form does act as a parental permission form.

Save-harmless forms. An alternative to release forms is the save-harmless form or statute. Some states have allowed their school boards to "save" the teacher "harmless" from certain types of actions if found negligent. This means that the school board (or the state) will pay the damages if the teacher is found liable. Usually, save-harmless statutes are in effect only for certain situations, such as those in which injuries result from breaking up a disturbance.

Some school board lawyers have developed save-harmless forms for parents to sign in place of the old liability release forms. This means the parents will save the teacher harmless if the teacher is found negligent. However, the exact legal status of these save-harmless forms has not been determined by the courts in many states. In any event, the save-harmless form will probably provide more legal protection than a liability release form would. In 1978 the National Education Association published a report on the status of save-harmless legislation across the country.[25]

Insurance. One of the ways educators can protect themselves is by acquiring tort insurance. While insurance may seem to be the solution to the tort risk, there is one major drawback. Most educators are not rich, and most people know it. A successful suit against a teacher is not likely to bring a large award. The income level at which most educators live might thus be a deterrent to a law suit.[26] However, possession of a tort insurance policy may attract law suits, because the pupil or his parents knows that the insurance company does have money. Therefore, while the tort insurance provides protection, it also offers an incentive for bringing a tort suit against an educator.

Notwithstanding the above, every educator should possess some type of bona fide tort insurance. This phrase "bona fide" is used because many policies that school boards purchase to protect their employees are worthless. Such blanket or umbrella policies frequently have "not negligent" clauses or "maximum damages" clauses, or clauses with wording of this kind: "This policy will cover all actions of educators who are engaged in activities appropriate to the educational process." Obviously, the (unintentional) injury of pupils falls outside "activities appropriate to the educational process." Be wary of such school board insurance policies. While many policies are indeed quite good, others are quite bad.

Educators who wish maximum protection from tort suits should acquire some type of private insurance. Policies of this type can be obtained through professional organizations such as the National Education Association, vocational associations, administrative organizations, etc., through private automobile insurance companies, or from home or renters' insurance companies. Such policies cost approximately $25 for $250,000 to $300,000 of protection. Most of these policies *do not* cover tort suits resulting from the administration of corporal punishment. Teachers who need such protection should request a "corporal punishment rider" on the original tort insurance policy. The additional cost will be about $5. (Note that tort insurance will not provide protection for educators against criminal acts; it is tort insurance, not criminal insurance.)

Inservice for aides and student teachers. Frequently, the question is raised, "Are aides liable?" The answer is, "Yes—sometimes." In general, courts are reluctant to hold aides liable unless they have been instructed in supervision of the activity for which they are responsible. Courts will hold teachers liable in supervising a lunchroom (they somehow believe that teachers were "trained" in how to provide lunchroom supervision) but will not hold aides liable unless it can be proven that the aides were provided instruction relating to the duty of lunchroom supervision.

Therefore, educators need to provide some type of inservice for aides and document the fact that this inservice took place. Perhaps an inservice day prior to the school year can be devoted to instructing school aides in supervision of various situations. Tell the aides what to watch for and do in a variety of circumstances. A written memo to an administrator stating what was covered in the inservice training, the names of the aides who attended, and the date should suffice for documentation.

Student teachers present a different kind of problem. At present the courts seem to be divided on the treatment of student teachers in tort cases. Some courts have ruled that student teachers are at the end of their educational training and that no magical transformation is likely to occur in the eight-week program. Hence these courts hold student teachers liable in the same way as certified teachers. Other courts, however, have held that student teachers are "students" and in a learning situation; thus student teachers are not liable—but the cooperating teacher is.

One way for educators to protect themselves (and student teachers) is to encourage the student teachers to obtain tort insurance for themselves. The National Education Association offers its student members an exceptional tort insurance policy for about $10.

Providing first aid. Situations may arise where basic first aid needs to be administered to an injured pupil. Should educators provide first aid? Obviously, in emergency situations school nurses or physicians can administer first aid, because they have been trained to do so. Also, teachers who hold Emergency Medical Training (EMT) licenses may do so because of their certification.

Teachers should only administer reasonable first aid in emergency situations as any prudent parent would. A popular school law textbook advises:

> Unless an emergency exists, a teacher or principal should never treat a sick or injured child except to render the first aid that a reasonable and prudent person would render under similar cir-

> cumstances. Only a competent person, i.e., one trained in the practice of medicine, should treat a pupil who is ill or who has sustained an injury.
>
> It should be emphasized, however, that teachers are not expected to possess expert medical knowledge concerning the treatment of injuries. They are only required to take that action which a reasonable and prudent layman untrained in the practice of medicine would have taken.[27]

Many states have "Good Samaritan" laws that protect people who render first aid. However, many of these good samaritan laws require that those giving first aid be properly trained to do so. The holding of an EMT license is a prerequisite to immunity in many cases.

Summary

It has not been the purpose of this chapter to frighten educators. However, many teachers and administrators are unaware of the scope of tort law and how it may affect them in the performance of their jobs. Educators should be constantly aware of the potential for pupil injury without becoming "gun shy" of the law. Simply by being more conscious of what may occur in classrooms and school hallways, the average teacher can develop good habits that will protect against tort suits and avoid injury to pupils.

Notes

1. William L., Prosser, *Law of Torts*, 4th ed. (St. Paul, Minn.: West Publishing Co., 1971).
2. Ibid., p. 2.
3. Francis Marian Burdick, *The Law of Torts*, 3rd ed. (Albany, N.Y.: Banks and Co., 1913), p. 12.
4. *Law of Torts*, 4th ed., p. 1.
5. Ibid., p. 2.
6. Giles Jacob, *Jacob's Law Dictionary*, vol. 6 (New York: I. Riley and P. Byrne, 1811), p. 251.
7. *Law of Torts*, 4th ed., p. 7.
8. Ibid., p. 8.
9. 42 U.S.C. 1983 is a federal statute allowing individuals to sue anyone, even public officials, for violating their federal constitutional or statutory rights.
10. *Law of Torts*, 4th ed., p. 38.
11. Ibid., p. 34.
12. Ibid., p. 41.
13. Ibid., p. 41.
14. Ibid., p. 42.

Tort Liability

15. Ibid., p. 42.
16. Ibid., p. 43.
17. *Dailey v. Los Angeles Unified School District* 470 P. 2d 360, 2 Cal. 3d 741, Supreme Court of California (1970).
18. Eugene T. Connors, "Governmental Immunity and Public Education," *Texas Tech Journal of Education*, vol. 4, no. 3 (Fall 1977), p. 196.
19. *Law of Torts*, 4th ed., p. 181.
20. Ibid., p. 183.
21. Ibid.
22. Ibid.
23. Ibid., p. 184.
24. R. Freeman Butts, "Search for Freedom: The Story of American Education," *NEA Journal* (March 1960), p. 33.
25. National Education Association. *Save Harmless and Liability Insurance Provisions in the Fifty States*. (Washington, D.C.: NEA, 1978).
26. Many states have laws prohibiting the taking of joint property (owned by both a husband and a wife) as a result of the liability of a single individual.
27. Leroy J. Peterson, Richard A. Rossmiller, and Marlin M. Volz, *The Law and Public School Operation*, 2nd ed. (New York: Harper and Row, 1978), pp. 277-278.

II

In-School Injuries

This chapter deals with injuries that typically occur in school. Pupils sustain these injuries, but so do teachers, other school personnel, and the public. We shall examine the kinds of injuries that occur in regular classrooms, school hallways, stairwells, and cafeterias, as well as those that happen on playgrounds and in school parking lots. Chapter IV examines injuries common in specialized classes, while Chapter V looks at those typical of physical education classes and athletic events.

Even in schools with the most conscientious personnel, pupils will be injured. There is no practical way to police every part of an educational setting to insure an injury-free environment. Usually, courts have held that educators should provide general supervision. However, in certain instances where there is additional danger to the pupils, the courts require more specific supervision. This means that supervision should be close and as constant as possible.

In Loco Parentis

The *in loco parentis* (in place of the parents) doctrine is extremely important to educators. Most states have statutory provisions that allow educators to stand *in loco parentis* to the pupils under their supervision. Even in states where there is no such law, courts have held it to be a common law doctrine. *In loco parentis* is not a static legal concept. It goes in and out of vogue as times change. It dwindled in the 1960s when college students won new freedom. However, it made a strong comeback in the later 1970s.

The *in loco parentis* doctrine is a double-edged sword. While it gives educators the same right to corporal punishment as parents possess (see the Chapter VI discussion of *Baker* v. *Owen*[1]), it also holds educators responsible for supervising pupils just as a conscientious parent would. In essence, *in loco parentis* requires educators to provide for the health, safety, and welfare of pupils in a manner similar to that of their parents.

The Kobylanski Case. In 1976 the Illinois Supreme Court issued a decision of great importance for the *in loco parentis* doctrine. While *Kobylanski* v. *Chicago Board of Education* (347 N.E. 2d 705, 1976) has to do with school athletics, which will be discussed in greater detail in Chapter V, the case affects all Illinois tort liability cases.

Basically, the Illinois Supreme Court found that since educators stand *in loco parentis* to their pupils, they cannot be found guilty of negligence unless a parent would be found guilty under similar circumstances. In other words, educators possess the same standard of protection against tort suits that parents have. In Illinois this standard is "willful and wanton misconduct."[2] Before educators can be found liable for negligence, it must be proved that their actions constituted "willful and wanton misconduct," not just mere negligence. Needless to say, the *Kobylanski* decision provides educators with great protection from tort liability suits.

Classroom Injuries

There are numerous cases involving pupil injuries in the classroom. These cases seem to be divided into two categories: 1) where the teacher was absent from the classroom at the time of the injury and 2) where injury occurred while the teacher was present.

As noted, the 1976 *Kobylanski* decision gives teachers better protection from tort suits. In two classroom cases decided since *Kobylanski*, teachers won because the parents bringing suit were unable to prove "willful and wanton misconduct" on the part of the teacher. In one case a kindergarten pupil was scalded when a teapot in which his teacher was boiling water fell on him during class.[3] The pupil's parents brought suit, alleging "willful and wanton misconduct" in allowing the child to play under the table on which water was being heated. The trial court found for the school district, claiming that there was no evidence of willful and wanton misconduct. The parents appealed that decision. The Appellate Court of Illinois found that while there may have been evidence of negligence, teachers in Illinois are not subject to any greater liability than parents. Parents are liable to their children for "willful and wanton misconduct" but not for mere negligence. Therefore, the court affirmed the ruling of the trial court in dismissing the case.

In the second case, Pamela Woodman, a second-grade pupil, was kicked in the head by another pupil while picking up paper from the floor of the classroom.[4] She sustained severe and permanent injury. Pamela's parents sued the school district, alleging that the teacher's carelessness and negligence in supervision of pupils in the classroom was the proximate cause of the injury. The trial court dismissed the case, finding that an act of omission in the maintenance of discipline by a teacher did not constitute "willful and wanton misconduct." The Woodmans appealed the case to the Appellate Court of Illinois. This court affirmed the finding of the trial court, holding that there was no proof of "willful and wanton misconduct" in this case.

In 1973 a Florida district appeals court overturned a trial court's dismissal of a suit against a third-grade teacher.[5] The teacher had asked her pupils to help her clean up the classroom the day after school ended. Several pupils showed up to help. McGahee, a pupil, was injured when he attempted to pull out a stubborn thumbtack with a pair of scissors. The scissors struck one of his eyes, causing permanent blindness. The higher court felt that a jury should have the opportunity to decide whether the teacher was negligent in allowing the pupil to use the scissors. The court said the jury should decide whether "...the scissors themselves would constitute a dangerous instrument, and if so, it would follow then if the teacher authorized their use or under the circumstances had reason to know they would be likely to cause injury, she would have had the responsibility of close supervision over the student."[6]

The North Dakota Supreme Court ruled in an interesting case regarding a pupil's assumption of risk in classroom situations. In *Wentz* v. *Deseth* (221 N.W. 2d 101, 1974) an eighth-grade pupil was severely burned during a candle-making exercise. Apparently, the teacher had to leave the classroom but instructed all pupils to put out their candles. All were put out. After the teacher left the classroom, however, a pupil relit Wentz's candle while he was engaged in a conversation with someone else. Then the other pupil poured after-shave lotion on the lit candle, which ignited and severely burned Wentz, causing permanent injury. At the trial the judge erred in instructing the jury on assumption of risk. Because of this the jury ruled in favor of the teacher. The North Dakota Supreme Court ruled that the pupil should be given a new trial, since assumption of risk was a moot point. The high court felt that the pupil was unaware of any risk and therefore could not have assumed it.

> There is nothing to show that Wentz had any knowledge of the dangerous flammability of the after-shave lotion, or that he had anything to do with igniting it or that he even knew it was being ignited. He was sitting at his desk obediently. He had nothing to do with the ignition of the lotion or the spread of the flames to his clothing.

> The burning candle sitting on Wentz's desk, undisturbed, was not the proximate cause of Wentz's injuries. There was an intervening cause, put in motion by another student's pouring or squirting the after-shave upon the candle, thereby igniting the lotion, which resulted in flames spewing from the container. It was these flames which caused the injury, not the flames of the candle.[7]

This case appears to make pupil awareness of risk a prerequisite for any defense an educator might use which involves student assumption of risk.

As educators know, there are times when pupils leave the school grounds without the permission or knowledge of school personnel. Two cases, one from Arizona and the other from Mississippi, demonstrate the point that school officials are not liable if pupils are injured under such circumstances. In both of these cases the pupil was killed by an abductor. The Arizona case, *Chavez* v. *Tolleson Elementary School District* (595 P. 2d 1017, 1979) resulted in an initial jury damage award of $400,000 against the school district. Ten-year-old Regina Chavez apparently left school to return a neighbor's puppy, which had found its way to school. She did not have permission from any school personnel. Her slain body was found three months later. The abductor was caught and convicted of the crime. However, her parents brought suit against the school district for negligence. After hearing the evidence, the jury awarded the parents $400,000 in damages. The trial court judge set aside the verdict on the ground that the parents failed to show that the school district had a standard of care to uphold.

The Court of Appeals of Arizona ruled in favor of the trial judge in the appeal. The court ruled that the schools do have a standard of care, saying, "[T]here can be little question that a school district and a classroom teacher owe a duty of ordinary care toward a student during the time the student is under their charge."[8] But the court also said that no one expects a pupil to be killed leaving the school premises:

> To say that murder is a foreseeable potential creating an unreasonable risk of harm to each child leaving school grounds each day in the state of Arizona is untenable. The heinous criminal conduct involved here, while shocking, is clearly in the category of the unforeseeable. If it were otherwise, prevision would become paranoia and the routines of daily life would be burdened by intolerable fear and inaction. The intervention of the criminal conduct was foreign to any risk created by the school personnel. As a matter of law, we hold that the defendants could

> not reasonably have foreseen that Regina Chavez would leave the school grounds without permission and thereafter be abducted and slain.[9]

In a similar case in Mississippi, the State's Supreme Court also upheld dismissal of a suit against a school district. The circumstances of *Levandoski* v. *Jackson County School District* (328 So. 2d 339, 1976) are very similar to those of the *Chavez* case. Thirteen-year-old Rose Marie Levandoski failed to return to her math class after a break. Neither the math teacher nor Rose's subsequent teacher reported her absence. The girl's body was later found in the Tchouticabouffa River. She had been stabbed to death. The parents filed suit against the school district, the principal, and the pupil's two teachers who failed to report her missing. The trial court dismissed the suit, stating that there was no causal connection between the teachers' and the school's failure to report the pupil missing and the pupil's death. The Supreme Court of Mississippi agreed with the trial court.

Teacher Absence Cases

Many suits arise from pupil injury when the teacher is out of the classroom. The courts do not seem to assume that the teacher's absence is proximate cause of injury. However, in almost every case, the pupil and/or the parents have alleged that the teacher's absence was the proximate cause of the injury. They claim that there was negligent supervision because of the teacher's absence.

Educators like to cite two older cases to prove that absence from the classroom is not proximate cause of injury. *Guyten* v. *Rhodes* (29 N.E. 2d 444, 1940) is one of these cases. It is considered a classic by some legal scholars. The case involves an injury to a student in class. The plaintiff, a 12-year-old pupil in a school for defective and incorrigible youth in Cincinnati, was struck in the eye by a milk bottle thrown by another pupil. The injury caused him to lose sight in one eye and impaired vision in the other. When this accident occurred, the teacher was outside the classroom talking to another pupil. Guyten, the injured pupil, claimed that leaving the school room without putting someone in charge, knowing the vicious character of the assaulting pupil and his previous attacks upon the plaintiff, constituted negligence. Also, furnishing milk bottles and permitting pupils to possess them was negligence. The primary concern in this case was the issue of proximate cause. The court found that the accident could have occurred even with the teacher present; therefore, the teacher's actions or lack thereof were not the proximate cause of injury. The court dismissed the suit against the teacher.

Ohman v. *Board of Education of the City of New York* (90 N.E. 2d 474, 1949) is the other, older yet classic, case involving teacher absence. Herbert Ohman, a 13-year-old pupil, was struck in the eye with a pencil thrown by another pupil. While the facts of the case indicate that the incident was not intentional, they also reveal that the teacher was not in the classroom at the time. Ohman's parents sued the board of education for negligence, alleging that the teacher's absence from the classroom constituted proximate cause of the injury. The Court of Appeals of New York found:

> A teacher may be charged only with reasonable care such as a parent of ordinary prudence would exercise under comparable circumstances. Proper supervision depends largely on the circumstances attending the event, but so far as the cases indicate there has been no departure from the usual rules of negligence.[10]

The court also addressed the issue of the plaintiff's suing the board of education instead of the teacher: "Here even if we assume without conceding that the teacher was negligent in leaving the room for any purpose, for any length of time, it does not follow that the board is liable for the consequences of an unforeseen act of a third party."[11] However, the court did indicate that it felt there was no abnormal danger involving the use of a pencil: "[No one can] seriously contend that a pencil in the hands of a school pupil is a dangerous instrumentality. This is one of those events which could occur equally as well in the presence of the teacher as during her absence."[12]

Perhaps the most famous case involving injury during a teacher's absence is *Segerman* v. *Jones* (259 A. 2d 794, 1969). Many teachers like to cite this case as proof that teacher absence from the classroom does not constitute proximate cause of injury. Rita Segerman was a fourth-grade teacher in Montgomery County, Maryland. On the day the injury occurred, normal physical education activities were being held inside due to inclement weather. In carrying out requirements of the physical education curriculum, Segerman was using an exercise record called "Chicken Fat." She had instructed her pupils which exercises to perform with each section of the record. While the pupils were exercising, Segerman left the classroom for a short time to take care of school business in the office. During her absence, a male pupil moved from his assigned place to the place next to Mary Jones. While doing one of the calisthenics, this pupil hit Jones's mouth with his foot and knocked her teeth out.

Jones's parents filed suit against Segerman for damages caused by the injury. The trial court found that Segerman's absence from the classroom was the proximate cause of injury and awarded $6,131 in damages. Segerman appealed the case to Maryland's Court of Appeals. The Court of Appeals reversed the findings of the lower court, stating, "If a rule can be developed from the teacher liability cases, it is this: A teacher's absence from the classroom, or failure properly to supervise students' activities, is not likely to give rise to a cause of action for injury to a student unless under all the circumstances the possibility of injury is reasonably foreseeable."[13]

In 1977 a Louisiana court of appeals ruled similarily in a case where the teacher had left the school for the day.[14] Laura Martel, a third-grade teacher, asked her pupils if some would agree to clean up the classroom after school. Three male pupils agreed and, after giving the pupils instructions in what to do, the teacher went home. One of the pupils, Larry Jolivette, went through the teacher's desk and found a small paring knife which Martel used to sharpen crayons. Jolivette cut another pupil, John Richard, in the eyelid with the knife. Although two doctors told John's parents that the injury was minor (only the eyelid was cut), they brought suit against the school district, the pupil and his father, and the teacher. The trial court found that the teacher was not negligent in leaving the knife in her desk or in leaving the children unsupervised.[15]

Richard appealed, claiming that the trial court erred in not finding the teacher's absence from the classroom to be the proximate cause of injury. The appeals court ruled that there was no teacher negligence involved either in the teacher's absence or the possession of a paring knife in her desk. The court said:

> ...[T]he paring knife was in a desk drawer and the students were forbidden to go near the desk. The teacher had not placed it in control of the students and left them unsupervised.[16]

Another very interesting Louisiana case is *Schnell* v. *Travelers Insurance Company* (264 So. 2d 346, 1972). In this case, however, the injured pupil won $44,500 in damages from the school board. The court said:

> The accident occurred during a school lunch recess. Plaintiff child, a sixth-grader, had permission of a first-grade teacher (her aunt) to "mind" some first-graders, work with them on vocabulary words and phrases, and read to them.[17]

In-School Injuries

An 11-year-old pupil was injured when, while opening the classroom door, her hand slipped and went through the glass window in the door. Apparently the pupil's hand was greasy from potato chips and another pupil, on the inside of the classroom, was leaning against the door. The Louisiana Court of Appeals upheld the damage award of $44,500, stating:

> It was negligence for the first-grade teacher to send Janet into, or knowingly permit her to be in, an unsupervised position when the natural playfulness of other children, inclined to tease or interfere with a child "teacher," might result in such horse-play as did occur. This negligence did cause the damage Janet suffered.[18]

The court held the school board liable in this case because the board failed "to have, in the door, glass of such characteristics that it would not break when an 11-year-old's hand might accidentally strike it with force."[19]

In addition to the above-mentioned cases, there are three interesting cases from Illinois. As mentioned earlier, Illinois law will not hold a teacher negligent unless, under the same circumstances, the parent can be found negligent. The legal standard of "willful and wanton misconduct" is derived from the *in loco parentis* doctrine.

A 1974 case, *Clay* v. *Chicago Board of Education* (318 N. Ed. 2d 153, 1974), involves injury to Georgia Clay, who was 11 years old and in the sixth grade at the time.[20] This is another case involving pupil injury in a classroom while the teacher was absent. While the teacher was out of the class, Clay was struck in the face and right eye by another pupil without provocation. Her parents brought suit against the school board and teacher. The trial court dismissed the suits, stating that there was no proof of "willful and wanton misconduct." The parents appealed the case to the Appellate Court of Illinois. This court saw two issues in the case. The first was whether the teacher not being in the classroom and leaving it unattended constituted "willful and wanton misconduct." The second was whether, as the suit alleged, the teacher and the school system should have known that the pupil who struck Clay had a history of this kind of violent behavior and therefore should not have allowed him to be alone in a classroom with other pupils. While the appeals court found that there may indeed have been evidence of "mere negligence" in this case, the plaintiffs failed to prove "willful and wanton misconduct"; it therefore affirmed the holding of the trial court and dismissed the suits against the board of education and the teacher.

Cotton v. *the Catholic Bishop of Chicago* (351 N.E. 2d 247, 1976) is an Illinois case involving injury of a pupil in a private school. Darryl Cotton, a private school pupil, was injured when physically assaulted by another pupil in a school gymnasium. The gymnasium was not under the supervision of any teacher at the time. Cotton's parents sued, alleging "a failure to supervise certain gymnasium activities; they were guilty of negligence." The trial court ruled in favor of the defendant's school, holding that the Cottons had not proven "willful and wanton misconduct," a standard that applied to private as well as public schools. The court felt that "to hold Section 24-24 [the willful and wanton misconduct standard] to be applicable only to public schools would create an arbitrary classification."[21] Therefore, the court found for the school against the pupil.

The third case from Illinois involved injuries sustained during a racial disturbance at a high school.[22] The injured pupil was a sophomore at Westview High School and was in a classroom with other pupils with the classroom door locked. However, there was no teacher in the classroom at the time. While the pupil was in the classroom, a pane of glass was broken in the door and approximately 30 black pupils entered the classroom. They hit Poytner on the head with a pipe; he was rendered unconscious and was taken to a hospital for treatment. The court in examining the facts found: "...[I]t is clear from the record that the teachers were given no special training in regard to the handling of riots or disturbances with the exception of being told to remain in the hallways when the students were there."[23]

The key to this case seems to have been in the language that the pupil's attorney used in filing the suit against the school district. Illinois law requires, as noted earlier, that for a school district to be found negligent there must be "willful and wanton misconduct." However, Poynter's attorney, instead of using "willful and wanton misconduct," used the phrase "negligently and carelessly." The trial court found that there was a great difference between "negligently and carelessly" and "willful and wanton" and therefore dismissed the case. The Appellate Court of Illinois upheld that finding.

This case shows that the ability of a plaintiff's legal representative is often crucial in a case of this kind.

Halls, Stairwells, Restrooms

While numerous pupil injuries occur in the classroom, many others occur in school corridors, stairwells, supply closets, restrooms, and school locker areas. Also, several significant cases involve school doors and windows that have injured pupils.

Two cases of the latter type came from Louisiana in 1972. The first involved an injury to a 12-year-old, sixth-grade pupil, Barbara Sims.[24] She severely injured her right hand when she put it through an exit door window. She had meant to push the panic bar, common on most school exit doors, but missed and pushed her hand through the adjacent double-strength panels of glass. The parents sued the school board for $1,188.85 in compensatory damages (for medical and doctor bills) and for $250,000 for Barbara's pain and suffering and permanent disability, which she asserted was incurred as a result of the negligence of the defendants in permitting children to use a door constructed as this one was.[25] The trial court dismissed the suit, and the parents appealed the case to the Louisiana Court of Appeals. The court upheld the finding of the trial court, stating that contributory negligence of the pupil caused the injury to herself:

> In applying that yardstick to the facts adduced herein, we are compelled to reach the inevitable conclusion that a 12-year-old girl of normal intelligence should be aware of the danger of rushing toward a glass-paneled door with her hand reaching for the "panic bar" when she was looking in the opposite direction.[26]

In the same year the Louisiana Court of Appeals made a contrary ruling in a similar case. In *Johnson* v. *Orleans Parish School Board* (261 So. 2d 699, 1972) a parent sued the school board for $25,000 when his daughter was injured by a cracked window in the school hallway. Brenda Johnson was a 13-year-old, seventh-grade pupil who was visiting the elementary school across the street from her junior high school. While waiting in the elementary school hallway, Johnson accidentally struck a large plate-glass window. At the time of the injury, the window was cracked and repaired with tape. The division superintendent had previously ordered the glass repaired with more durable material. The trial court ruled in favor of the pupil and her father, awarding $2,700 in damages. The school division appealed the case, alleging that the pupil was contributorily negligent in that she leaned against a window obviously cracked and in need of repair. The appeals court upheld the trial court ruling, stating:

> The defendant knew that the window was broken and had it taped as a temporary precautionary measure. However, to permit a window as large as this one to remain in such condition for a period of four months in an area children are known to frequent

> is certainly indicative of negligence on the part of the defendant.[27]

Another "door" case also comes from Louisiana in 1977.[28] A high school pupil, Robert Lewis, had the fourth finger of his hand severed when a door he was opening to the school's music room was slammed shut on his fingers. At the trial there was testimony that the door was faulty, because pupils in the music room had to slam the door to keep it closed. Apparently, a pupil in the room, seeing the door swing open, slammed it shut on Lewis's fingers. Lewis's father brought suit against the school board, alleging negligence in maintaining the door. The trial court awarded $3,587.25 in damages ($3,000 of which was punitive damages). In examining the case on appeal, the Louisiana Court of Appeals found:

> "Liability of the school board for an allegedly dangerous condition of a door which purportedly necessitated the practice of slamming it shut could be imposed if it were shown that a dangerous condition had existed for sufficient time to justify the conclusion that they are charged with knowledge of the dangerous condition, or if they actually had knowledge of the dangerous condition and did not remedy it."[29]

However, the court reversed the ruling of the lower court, dismissing the suit, because the school division rebutted allegations of negligence by producing evidence that all school buildings were inspected each month for dangerous conditions and that the previous month's inspection revealed no defect in the door. The court said:

> The existence of actual knowledge is in fact contravened by the testimony of Robert Blanchard, the supervisor of buildings and grounds for the St. Bernard Parish School Board, who stated that records of complaints were kept, and there had been none concerning the door in question. Furthermore, Blanchard's testimony established that he inspected the school for cleanliness and necessary repairs on a monthly basis.[30]

Not only are educators and school boards sued for "defective" doors and windows in schools but also for injuries sustained by pupils in school restrooms, supply rooms, lockers, and auditoriums.

In *Lauricella* v. *Board of Education of City of Buffalo* (381 N.Y.S. 2d 566, 1976), a high school pupil was attacked in the school restroom and was "pushed, thrown, or forced to jump" from the window of the second floor lavatory.[31] The pupil sustained severe injuries in the fall and sued the board of education for not providing adequate supervision. Testimony at the trial revealed that the school had experienced several previous instances of pupil violence, including a very serious one the day before. The principal had implemented a plan of intense supervision by teachers on the morning of the injury, but "notwithstanding these planned precautions, about 20 students were allowed to gather in the lavatory where the incident took place and no teacher or aid investigated this situation."[32] The Supreme Court of New York, Appellate Division, upheld the trial court's ruling that the absence of supervision constituting proximate cause was an issue for a jury to decide.

Washington State added an interesting case to educational tort law in 1969. In *Osborn* v. *Lake Washington School District* (462 P. 2d 966, 1969), James Osborn, a 15-year-old pupil, was injured in a school supply room when a voting machine fell on him, fracturing his leg. Osborn's teacher had escorted the class to the lunchroom. In the middle of the lunchroom was a supply closet. Osborn and several other pupils entered the closet immediately upon reaching the lunchroom. The teacher asked the boys to leave the closet and they did so. The teacher then left the lunchroom, even though she was assigned to supervise the area. The court of appeals then describes what happened:

> In her absence the boys began to talk and run around; general disorderliness quickly developed. During the state of disorder, the plaintiff and three companions re-entered the storeroom. Once inside, some other boys closed the door and refused to let them out. The boys in the storeroom could not find the light. They yelled and pounded on the door for as long as three minutes, asking to be released.
>
> There is no evidence that the boys were "roughhousing" in the storeroom. During the confusion, however, the voting machine fell on plaintiff, fracturing his leg. No one knows what caused the machine to tip over.[33]

Osborn sued the school district for negligence. During the trial the defense attorney brought to the attention of the jury that Osborn lived in a home for boys and had been convicted of truancy, running away from home, vandalism, and theft. The jury found the school district not negligent. The pupil appealed, claiming that the defense attorney had prejudiced the jury by exposing his background. The Washington State Court of Appeals agreed. It found the defense attorney's actions wrong, and, believing that the issue of negligence should be decided by an unprejudiced jury, ordered a new trial.

A 17-year-old girl won a suit against her school district in *Kingsley* v. *Independent School District #2, Hill City* (251 N.W. 2d 634, 1977). LaVonne Kingsley, the injured pupil, had been experiencing trouble because other pupils were going into her locker and throwing her coat on the floor. On the day of the injury, she found her coat lying on top a bank of lockers. She climbed on top of the lockers and retrieved her coat. In jumping down she caught her ring on a metal protrusion on top of the locker. The ring finger was torn off. She sued the school district for negligence and won. The school district appealed the case to the Supreme Court of Minnesota. The high court found the school district's contention that no dangerous condition existed to be shallow, citing testimony from the trial:

> This position completely overlooks the dramatic testimony by a fellow student that after the occurrence he went to the scene and picked what remained of LaVonne's finger off the top of the locker at the point where [she said] the accident occurred. This testimony permitted the inference that the dangerous condition of the locker described by the janitor and disclosed in the pictures as in existence as of the date of trial was the same on the date of the accident. The facts on the issue of a failure to maintain and adequately supported the finding on liability.[34]

Therefore, the court upheld the finding of negligence against the school district.

Viveiros v. *the State of Hawaii* (513, P. 2d 487, 1973) is a famous case involving a pupil injury that occurred while a pupil-run light show was being presented in a high school auditorium. Three or four teachers had been expected to supervise the activity. However, because of a scheduling mix-up, they were absent. An administrative assistant was present briefly, but left for a coffee break. Therefore, no educators were present in the auditorium when the injury occurred. The record shows that Joanne Viveiros, age 15, paid her 25 cents admission and went into the auditorium. No seats were available, so she and her friends stood in the aisle. The audience of pupils was well-behaved at this point. In a short time, however, some pupils in a corner of the auditorium became boisterous and rowdy. The rowdiness was primarily verbal. Viveiros was approximately 35 feet away from this group and had no fear of bodily harm at the time. However, a few minutes later a metal object was thrown, striking her in the left eye and causing permanent damage to her vision.

The trial court examining this case found the state 75% liable and Joanne Viveiros herself 25% liable. This was a case, then, of comparative negligence as well as contributory negligence. The trial court felt that Viveiros should have known she was in danger and that by standing where she did she contributed to her own injury. Viveiros appealed the decision of the trial court, which had awarded general damages of $15,000 and special damages of $180.84. The Supreme Court of Hawaii overturned the trial court's ruling. They found that Viveiros was not negligent of her own well-being, that she had no reason to fear bodily harm, that the group boisterousness was primarily verbal, and that there was no physical threat to her. Consequently, Viveiros could not reasonably anticipate physical harm. Therefore, she could not be contributorily negligent or guilty of comparative negligence. The high court then found the state to be 100% negligent in this case by not providing adequate supervision in the auditorium.

Another recent case involves injuries to a sixth-grade pupil while he was outside the school building. The pupil was asked by his teacher to empty the classroom wastebasket into the incinerator located behind the school.[35] Ordinarily, only burnable trash was to be deposited there, not cans or bottles. However, when the pupil opened the incinerator door and emptied the wastebasket, a can exploded, causing the pupil to be burned on his face and hands. Testimony at the trial indicates that the can that exploded had been in the incinerator for some time before the pupil emptied the wastebasket.

The pupil sued the school district, the principal, and the teacher. The trial judge concluded that there was no negligence on anyone's part. The pupil appealed. The Court of Appeals of Louisiana affirmed the decision of the trial judge, stating:

> Our jurisprudence is settled that a school board is not the insurer of the lives or safety of children. School teachers charged with the duty of superintending children in the school must exercise reasonable supervision over them, commensurate with the age of the children and the attendant circumstances. A greater degree of care must be exercised if the student is required to use or to come in contact with an inherently dangerous object, or to engage in an activity where it is reasonably foreseeable that an accident or injury may occur. The teacher is not liable in damges unless it is shown that he or she, by exercising the degree of supervision required by the circumstances, might have prevented the act which caused the damage, and did not do so. It also is essential to recovery that there be proof of negligence in failing to provide the required supervision and proof of a causal connection between that lack of supervision and the accident.[36]

Therefore, the suit against the school board was dismissed.

It is apparent from the cases presented in this section that courts, like juries, are highly inconsistent. However, several lessons can be learned. For example, defective or broken glass should be replaced at once; and regular inspections of school facilities help in defending against suits.

Lunchrooms

School lunchrooms, like classrooms, may figure in negligence suits. Several well-known cases illustrate the courts' approach to lunchroom supervision.

An important case was decided in California in 1940. A female elementary pupil had her arm broken by another pupil in the lunchroom during lunchtime.[37] No teachers or supervisors were present at the time. The parents of the injured pupil sued the school district, alleging negligence that resulted from lack of supervision. The District Court of Appeals ruled for the parents, stating that if a teacher had been present the injury would not have occurred:

> Since the accident occurred in a schoolroom during the luncheon hour, it requires no speculation to assume that if the supervisor had been present in that room she would have observed the unusual scuffling and rough conduct of the students and she would naturally have commanded them to desist. Indeed, we may assume that if the teacher had been present the scuffling would not have occurred. Under those circumstances, with the supervision required by law, the injuries would not have resulted.[38]

The court held that a school district can be sued for negligence if one of its employees failed to provide adequate supervision: "But when the omission to perform a duty, like that of being present to supervise the conduct of pupils during an intermission while they are eating their lunches in a schoolroom, may reasonably be expected to result in rough and dangerous practices of wrestling and scuffling among the students, the wrongful absence of a supervisor may constitute negligence, creating a liability on the part of the school district."[39]

Another famous case came out of California 30 years later in 1970. It also concerns the issue of proper supervision at lunchtime. *Dailey* v. *Los Angeles Unified School District* (470 P. 2d 360, 1970) involves the death of a pupil during lunchtime. Michael Dailey, a 16-year-old high school student, was killed during lunchtime while attending school. He and some friends finished eating lunch and were proceeding to the gymnasium area when Michael Dailey and another pupil became involved in a "slap-boxing" game; i.e., they were fighting with open hands rather than clenched fists. Apparently the other pupil knocked Dailey to the ground, where he struck his head on concrete. He died that evening.

The parents of the dead pupil brought suit against the school district for negligent supervision. Only four teachers had been assigned to supervisory duty where over 2,700 students were eating lunch. The four supervising teachers did not have any specific supervisory plans. In fact, one was playing cards in the gym while another was eating lunch in his gym office. The trial court found that there was not sufficient evidence for a guilty verdict and dismissed the suit against the school district. The Daileys appealed the case to the Supreme Court of California which, in reviewing the evidence regarding adequacy of supervision, found:

> High school students may appear to be generally less hyperactive and more capable of self-control than grammar school children. Consequently, less rigorous and intrusive methods of supervision may be required. Nevertheless, adolescent high school students are not adults and should not be expected to exhibit that degree of discretion, judgment, and concern for the safety of themselves and others which we associate with full maturity.[40]

Therefore, the court ruled that even though Michael Dailey was 16 years old and was a high school pupil, he and his friends were in need of some kind of supervision. The school district failed to provide adequate supervision, assigning only four people for 2,700 pupils; and the two individuals who were supposed to have been supervising the area outside the gymnasium (where the death took place) were in fact negligent in their supervisory duty. The Supreme Court of California reversed the finding of the trial court and ordered a new trial for negligence.

School officials are not only responsible for supervision of the cafeteria and other school areas during lunchtime but also for the condition of the cafeteria, as illustrated in *Sansonni* v. *Jefferson Parish School Board* (344 So. 2d 42, 1977). In this case the court awarded a 13-year-old elementary school pupil, $48,518.15 in damages from a Louisiana school district ($45,000 of the award was for general damages). The pupil, Gary Sansonni, slipped on some kind of food (apparently spaghetti sauce) on the cafeteria floor. He fell and was severely injured, sustaining a broken leg, a fractured vertebra, and other injuries that caused permanent deformity and required him to wear back and leg braces. The defendant school district appealed the damage award and jury verdict to the Louisiana Court of Appeals. That court upheld the ruling of the trial court, finding that the section where the pupil was injured constituted a "high risk area" because of heavy traffic by pupils carrying full trays of food. The court felt that the school should have assigned someone specifically to police or supervise that area of the cafeteria.

> We note that this particular area is crossed over by every student carrying the tray of food he receives in the food line. Additionally, the garbage can where the students emptied their trays were close to the area of the fall, and all witnesses testified quite often there was food on the floor around the garbage cans. Based upon the credibility determination of the [trial] judge and these facts, we conclude this was a high risk area and more careful supervision was necessary. We agree with the finding of liability.[41]

Edmonson v. *Chicago Board of Education* (379 N.E. 2d, 27, 1978) is another lunchtime case involving sovereign immunity. It occurred after the famed ***Kobylanski*** case already discussed. Teresa Ann Edmonson was pushed to the ground by a pupil behind her while in the luncheon line and was injured. At the time of the incident, two teacher's aides were supervising the lunchroom. It is important to note that neither of these aides was a certified teacher. Illinois, at the time, had a statute conferring *in loco parentis* (in the place of the parents) responsibilities upon "teachers and other certified educational employees." The trial court held that there was no cause of action against either of the teacher's aides or the school system. The court also found that the aides were members of the teaching force, because they were performing a teacher function in supervising the luncheon line. Thus, under the court's definition, the protected class—including a janitor or school nurse performing the same function—would be entitled to immunity from suit for injuries arising out of his or her negligence. Also, the trial court found that the school board incurred no negligence whatsoever, simply because it had acquired tort liability insurance. The case was appealed to the Appellate Court of Illinois, which disagreed with some of the findings of the trial court. It found that the teachers' aides themselves were not liable because they did not exhibit "willful and wanton misconduct"; however, the appellate court did hold the Chicago Board of Education liable because it did in fact purchase tort liability insurance, which the court interpreted as a waiver of sovereign immunity.

Therefore, no action was taken against the two teachers' aides. However, a new trial was granted to settle the issue of negligence on the part of the Chicago Board of Education in having two noncertified personnel (teachers' aides) supervising the lunchroom.

In summary, school cafeterias and lunch areas have great potential for liability suits. The courts expect educators to provide adequate supervision of these areas and to provide a safe environment by assuring that the area used by the pupils is clean and free of spilled food or drink.

Recess and Playground Situations

Situations arising on the playground during recess often result in suits brought by parents and pupils against educators. Even in the best supervised areas, pupils frequently get hurt. Most courts have ruled that playground equipment is not dangerous and does not constitute an attractive nuisance *per se*. However, improperly maintained playground equipment can quite easily sustain a negligence suit. Not surprisingly, a number of cases hinge on the element of supervision. Does a teacher have to be on the playground at all times? Can a teacher's aide substitute for the teacher in such circumstances? What if there are rocks on the playground and a pupil is injured with one? These are among questions with which we must deal.

The Oregon Court of Appeals issued an interesting ruling in 1976 when an elementary school pupil was injured on playground equipment.[42] The court ruled that assumption of risk and contributory negligence were viable defenses to the suit brought by the parents of the injured pupil.

In 1970 an Illinois appellate court delivered an opinion dealing with playground equipment as an attractive nuisance.[43] A 3½-year-old child was injured when he fell from a playground slide located on school property. The suit alleged that the defendant school maintained a playground "with various playground equipment including the higher of two slides, which was inherently attractive to young children."[44] The parents of the child specifically alleged that the school carelessly and negligently 1) maintained the higher of the two slides with the knowledge that young children played upon the higher slide, which was dangerous and unsafe; 2) failed to warn the young children of the danger of playing on the higher slide; 3) failed to provide a guard, supervisor, watchman, or other employee to prevent young children from climbing on the higher slide; and 4) failed to fence or barricade or otherwise impede young children from having access to the higher slide. The trial court, upon hearing the evidence, decided that there was no cause of action and dismissed the complaint. The parents appealed the case to the Illinois Court of Appeals. This court found as follows: "The risks that children will climb upon and fall from an admittedly nondefective, standard playground slide is not an 'unreasonable risk' so as to produce a duty to require defendant to fence, guard, or supervise the playground slide or warn plaintiff against its use."[45]

Thus the judgment of the trial court was sustained and affirmed; the child and his parents lost the case. An interesting aspect of this case was the fact that the parents brought an "attractive nuisance" suit against the school but never called it such. In any event, the Illinois Court of Appeals ruled that an unsupervised playground is not inherently dangerous.

Hall v. *Columbus Board of Education* (290 N.E. 2d 580, 1972) involved the issue of sovereign immunity in Ohio in relation to playground equipment. This case involved an injury to an elementary pupil who fell from the top of a sliding board on the playground, striking a blacktop surface with his head and ear. The parents of the pupil brought suit against the school system, alleging negligence. Ohio, like many states, has a state sovereign immunity statute that prohibits such suits unless "school officials, teachers, and employees are liable for malicious or deliberate harm or injury to other persons."[46] Thus the burden of proof was on the plaintiff to prove that malicious intent or gross negligence was involved. Upon reviewing the facts of the case, the Ohio Court of Appeals upheld dismissal of the charges, ruling as follows:

> We find no charges of malicious or deliberate harm of fraud or false representation or of a failure to perform ministerial duty against the individual defendant. Therefore, in the absence of any statutory provision imposing liability, such individual school officials cannot be held liable for torts committed by them in the performance of their duties, and they are not liable for any alleged negligence of their employees.[47]

While the above ruling is typical, the courts will hold school officials liable if playground equipment is defective or in need of repair. A 1975 case from Washington, D.C., illustrates this point. In *District of Columbia* v. *Washington* (332 A. 2d 347, 1975), an 18-month-old infant was injured on a school sliding board. The infant's aunt had taken him to the playground to play. After he slid down the board, the aunt noticed that the child's left hand was severely cut. She also noticed a metal piece protruding from the left side of the sliding board. She took the child to the principal's

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office, where first aid was administered. The child was then taken to the hospital, where a finger on the left hand had to be amputated. The parents sued and won $5,209.10 in damages. There was testimony at the trial that a teacher had informed the principal of the defect on the sliding board two or three days before the injury. The D.C. Court of Appeals upheld the finding of negligence by the trial court and jury.

In 1971 the Minnesota Supreme Court upheld a $50,000 damage award against a Catholic school. In *Sheehan* v. *St. Peter's Catholic School* 188 N.W. 2d 868, 1971), an eighth-grade girl lost the sight of her right eye after being hit with pebbles by boys playing baseball. The pupil's teacher had taken her and 19 of her female classmates to the playground to watch the boys play. The girls were directed to sit along the third-base line. The teacher then left the playground and did not return until after the injury. The ballplayers started throwing pebbles at the girls until the Sheehan girl was hit in the eye. The jury awarded $50,000 in damages to the pupil. The school appealed that decision. The Minnesota high court ruled that the lack of supervision contributed to the injury:

> ...[T]he pebble throwing continued for three or four minutes before plaintiff was injured. Under such circumstances, a jury could properly find that had the teacher been present she would have put a stop to this dangerous activity before plaintiff was struck.[48]

The main point of this case was that if a teacher had been present, the injury could have been prevented. The courts concluded that a lack of supervision led to the injury.

A well-known similar case is *Fagan* v. *Summers* (498 P. 2d 1227, 1972). This case involved a pupil injury that occurred during recess on the school parking lot. A 7-year-old pupil, George Fagan, was blinded in one eye by a rock thrown by another pupil. Fagan sued the teacher's aide who had supervision of the playground at the time, as well as the school district. The trial court dismissed the suit against both the aide and the school district, claiming that there was no proximate cause of injury. Fagan's lawyer appealed the case to the Wyoming Supreme Court, which determined that the teacher's aide had walked past the pupils not less than 30 seconds before the injury occurred. Therefore, the court concluded, she was on duty and was properly supervising the playground. The court stated:

> There is no requirement for a teacher to have under constant and unremitting scrutiny all precise spots where every phase of

> play activities is being pursued; and there is no compulsion that general supervision be continuous and direct at all times, at all places.
>
> A teacher cannot anticipate the varied and unexpected acts which occur daily in and about the school premises. Where the time between an act of a student and an injury to a fellow student is so short that the teacher has no opportunity to prevent it, it cannot be said that negligence of the teacher is a proximate cause of the injury.[49]

For these reasons, the Wyoming Supreme Court dismissed all charges against the teacher's aide. In pursuing charges against the school district, the lawyer for Fagan claimed that the rocks being thrown by the pupils came from construction taking place next to the school and that the playground had been in disrepair for approximately two years. The lawyer argued that this was an unreasonable length of time and that the school district should have kept the parking lot and the playground in better condition. Concerning this issue, the court stated:

> We realize that there are cases which hold a school district liable for injury resulting from a dangerous and defective condition of a playground. We have found no case, however, which holds rocks on the ground to be a dangerous and defective condition. Left on the ground, a rock will hurt no one.[50]

Thus the court found that the condition of the playground was not the proximate cause of injury. In fact, the court found that the proximate cause of injury was Fagan's friend, the pupil who threw the rock. It dismissed all charges against the school district and against the teacher's aide.

Capers v. *Orleans Parish School Board* (365 So. 2d 23, 1978) is a recent case in which the Louisiana Court of Appeals ruled that garbage containers are not inherently dangerous. Eric Capers, a 6-year-old pupil, climbed on top of a commercial-sized garbage container (dumpster) during the noon recess. The pupil fell from the garbage container and sustained an injury. The parents sued, alleging that the containers were inherently dangerous and that the school failed to provide an adequate standard of care, having only six to eight adults supervising 250 to 300 pupils in the play area. In its decision, the court stated:

> The standard of care for school teachers and administrators is that of a reasonable person in such a position acting under similar circumstances. Reasonable care includes protecting against

> unreasonable risk of injury from dangerous or hazardous objects in the school building and on the grounds.
>
> As to the duty of supervision, the board's employees must provide reasonable supervision commensurate with the circumstances. Here, supervision of 250 to 300 students by six to eight adults during the noon recess on fenced school grounds constituted reasonable supervision under the circumstances... The fact that one child wandered to the rear of the yard into an area away from the normal play area does not necessarily indicate substandard supervision, especially when the area contained nothing inherently hazardous and was within the fenced school grounds.[51]

Another interesting case from Louisiana is *Sears* v. *City of Springhill* (303 So. 2d 602, 1974). Paul Sears, a 12-year-old, was injured during a game of touch football during the lunch recess. He ran slightly beyond the playground yard into some weeds and fell into a ditch, breaking one of his legs in two places. The pupil's father sued the city of Springhill, alleging that the ditch and surrounding uncut areas were hazards because they were so close to a playground area. Sears won $651 in medical expenses damages and $5,000 in general damages from the jury. The judge at the trial held that the pupil could not be held contributorily negligent in such a situation. The city appealed the decision.

Apparently, the pupil's teacher had warned the class about the ditch at the beginning of school, and a notice had been placed by the ditch. However, the court found neither of the defenses to be sufficient:

> The teacher had given the warnings to many prior classes during the early days of school. She was not certain that Paul Sears was present when she gave his class her warning lecture. A posted notice was found by the court to be inadequate in itself to put a 12-year-old child on notice of the open ditch.[52]

The Louisiana court found the city negligent because it possessed a hazard concealed by a growth of weeds, high grass, and briars, saying:

> The open ditch, with weeds growing knee-high along its edge, was indeed a hazard, and to leave it unguarded without warning signs or barriers at the end of the playground on the school board property was negligence, particularly in view of the fact that the playing of "touch" football was not only permitted at recess but encouraged... The same conclusion is inescapable with reference to the school board's action in the instant case in permitting the

> open ditch, concealed by a growth of weeds, grass, and briars, to remain without barricades, warnings, or other protective means.[53]

This case has several implications for educators. Warning notices or signs are an inadequate defense when one is dealing with minors. Also, verbal warning by a teacher may be insufficient. In the *Sears* case, this was true for two reasons: First, the teacher had not documented the warning. Second, the teacher could not certify that Sears was present on the day that the class was warned about the ditch.

To summarize: 1) While playground equipment is not inherently dangerous, educators are liable for injuries resulting from use of defective or dangerous equipment in their schools. 2) Even though some courts have ruled that rocks on a playground are not inherently dangerous, playground areas should be cleared of rocks and debris if possible. 3) Lack of supervision during recess can be the proximate cause of injury to pupils. Either teachers or teacher's aides should be present when children are playing on the playground.

Handicapped Pupils

An older yet significant case in the handicapped pupil area comes from Louisiana.[54] Gordon McDonald was a 10-year-old pupil in a special education program. On an inclement day McDonald and his classmates were in the classroom during the normal recess period. The special education teacher left for five to six minutes to get a cup of coffee. She had asked the teacher across the hall to supervise her pupils in her absence. Apparently, McDonald and another special education pupil became involved in a scuffle. The other pupil, fearing injury, retreated from the classroom into the hall. McDonald pursued. The other pupil threw a broom at McDonald in self-defense. The broom handle struck McDonald in his left eye, causing permanent loss of sight.

McDonald's father initiated suits against the pupil who threw the broom, the absent teacher, and the school board. The trial court dismissed all the suits, stating that McDonald was contributorily negligent, since he was the aggressor in the scuffle. The father appealed and the Louisiana Court of Appeals upheld the ruling of the trial court. In addressing the suit against the other pupil (Larry Pledger), the court stated:

> [The trial court] further determined that McDonald put Pledger in fear of bodily harm, that he deliberately continued the en-

> counter when he followed the smaller boy into the hall as he retreated, and that Pledger threw the broom for protection only, thus pretermitting any recovery on the part of the plaintiff. In short, it was decided that McDonald was the aggressor who should be denied recovery for personal injuries inflicted upon him in self-defense by an adversary.... It is well established that a person on the defensive in an altercation has a right to protect himself if the circumstances are such that he might reasonably conclude that he is in danger of bodily harm. However, that retaliation must be commensurate with the force exerted against him and cannot go beyond that which is reasonably necessary for self-protection.[55]

The court also addressed the suit against the teacher and the school district. It found neither negligent, even though the teacher (Mrs. Sanchez) was absent from the room:

> Her momentary absence from the classroom does not amount to negligent conduct on the teacher's part, as she requested Mrs. Hebert, the teacher of an adjacent class, to supervise her students in her absence. Mrs. Hebert stated that Mrs. Sanchez had been gone only five or six minutes and that she (Mrs. Hebert) had heard only the usual noise for a play period during that time. The fact that each student is not personally supervised every moment of each school day does not constitute fault on the part of the school board or its employees.[56]

Whitney v. *City of Worchester* (366 N.E. 2d 1210, 1977) is another case involving an injury to a handicapped pupil while he was on school premises. It is also a major case in the sovereign immunity issue in the state of Massachusetts. Chris Whitney was a 6-year-old first-grader. He was totally blind in the left eye and had limited vision in the right eye because of glaucoma. On the day the injury occurred, Whitney's teacher was informed that Whitney was suffering from hemorrhaging of his sighted eye, which further impaired his vision. Whitney was directed to proceed to the school yard, which required passing through school corridors, down stairs, and through an allegedly defective door without any supervision or assistance. Apparently, as Whitney went through the door a defective closing mechanism slammed it shut, hitting him on the head and thereby causing his sighted eye to go completely blind. His parents brought suit against the school system and the teachers for damages. At the outset of its opinion, the court stated:

> On previous occasions we have voiced our conclusion that governmental immunity doctrine and the scheme of rules and exceptions which have developed over the years are unjust and indefensible as a matter of logic and sound public policy.[57]

The court found that, while there was no *prima facie* evidence of negligence, this is the kind of case that should be given a jury trial. Therefore, it sent the case back to a trial court, which was to hold it in abeyance until the legislature adopted some abrogation of immunity. Then the case was to be heard by a jury to determine damages. As this book is written, no decision has been reached.

There have been cases involving injuries to handicapped pupils on playgrounds during recess. *Schumate* v. *Thompson* (580 S.W. 2d 47, 1979) is such a case. A retarded pupil was injured when attempting to perform a high jump during recess. He sustained a fractured vertebra of the neck. A teacher was on duty, supervising the playground, at the time of the injury. The Texas court ruled that there was no negligence on the part of the teacher or the school district.

A recent case from Louisiana examines the liability of educators in a vocational training setting.[58] Evergreen Presbyterian Vocational School was sued by the parents of Stephen Hunter for his death while at the school. Hunter had been enrolled for three-and-a-half years. On the day of his death he was with a landscaping crew working near a pond. He drowned while retrieving a tool from the pond. The staff supervisor was not present at the time of Hunter's death. The court found that the school had a pupil/staff ratio of two to one, which provided "close, but not constant, supervision." The parents sued the school, alleging that because their child was retarded, he required constant supervision. They charged that the staff supervisor's absence violated the school's responsibility for constant supervision. They also alleged that the pond was an attractive nuisance and should have been fenced in. The Court of Appeals of Louisiana ruled that there was no need for continuous supervision:

> Evergreen's duty to use reasonable care in this instance did not dictate continuous supervision. The school's policy to allow its students a certain amount of freedom consistent with their mental capacities was reasonable and necessary to the accomplishment of the school's purposes.
>
> The educational advantages of providing the students some freedom and opportunity to learn self-reliance, and the quality-of-life advantages of the open-space rural environment in which the students lived and worked, far outweigh the risks of harm at-

> tendant thereto. The risks were minimal and were not unreasonable under the circumstances.
>
> The duty of the school to provide reasonable care to protect the retarded student from harm did not include the duty of providing continuous supervision or the duty of enclosing the pond. The school's conduct did not create an unreasonable risk of harm to the decedent, nor was the school's conduct substandard. There was no breach of the duty of reasonable care.[39]

Certain conclusions can be drawn from these cases involving handicapped pupils. For example, the courts use the same standards in assessing handicapped pupils' injuries as they use for normal pupils. However, the courts do take into account the fact that handicapped pupils require special supervision and reasonable care.

Other Cases

This section reports illustrative cases that do not fall neatly into the previous categories. First, let us examine briefly two cases involving nursery schools. In *Larry* v. *Commercial Union Insurance Company* (277 N.W. 2d 821, 1979), Carla Larry, a 2-year-old nursery school pupil, was injured when she fell in the school lavatory. She sustained a "nasty and permanent scar on her chin." The jury found the nursery school negligent and awarded $750 in damages. The parents appealed the case to the Wisconsin Supreme Court, claiming that they should have been awarded more money. The state's high court agreed, stating that the preponderance of evidence should allow a higher monetary award, and ordered a new trial to re-examine the award amount. (As this was written, no decision had been reached.)

As mentioned earlier, the state of Illinois has an interesting standard for determining teacher negligence. The second case examines whether or not this standard applies to nursery schools. *Possekel* v. *O'Donnel* (366 N.E. 2d 589, 1977) involved injury to a young child attending a day-care nursery school. The child's parents sued, alleging that negligence was involved and that the nursery school was not really a "school"; therefore, the "willful and wanton misconduct" standard did not have to be met for a suit to be brought against the institution. The trial court ruled for the nursery school and dismissed the case. The parents appealed to the Illinois Appellate Court which saw two issues: 1) Is a day-care center or nursery school a real school? 2) Is such a school protected under the willful and wanton misconduct standard? After reviewing numerous cases to determine what constitutes a school, the court concluded that, in order for an institution to genuinely be a school, it must offer some kind of instruction, not merely baby-sitting services. Therefore, the court concluded that a nursery school may not be a school, depending upon the nature of the institution. In the second issue, whether the willful and wanton misconduct standard applies to nursery schools; the court found that it does not; the statute requiring willful and wanton misconduct does not specifically include day-care centers and nursery schools. Therefore, the appellate court reversed the decision and sent the case back to the trial court for another trial.

Gordon v. *Oak Park School District #97* (320 N.E. 2d 389, 1974) is an unusual case from Illinois. Suit was brought by parents of several children, who claimed that the school district, through its teachers, board members, and other officials, had maliciously and intentionally abused, attacked, hit, embarrased, intimidated, and harassed the students during school time. One student complained that her teacher broke her crayons, marked her paper with Xs, chased her around the classroom, refused to allow her admittance into the reading group, placed her in an isolated section of the classroom, and made her stand in the closet. Another student complained that a teacher pulled his hair, referred to him as dumb and stupid, imitated his lisp, and made him bite his fingernails in front of the class. Another student alleged that a teacher made disparaging remarks to the class concerning his conference with the school psychologist. Another student alleged that he was transferred from a high reading group to a low reading group and that teachers frequently grasped him by the neck, leaving scratches.

The trial court found no evidence establishing conduct on the part of the teachers that could be deemed willful or malicious. Therefore, it dismissed the case. The case was appealed to the Illinois Appellate Court. The appeals court, in examining the decision of the trial court, first looked at the issue of *in loco parentis*. It said, "A teacher standing *in loco parentis* has the right to inflict corporal punishment so long as the action is reasonable under the circumstances."[60] The court then looked at the matter of willful and wanton miscondust. It found:

> An act is willful and wanton if it is committed intentionally or under circumstances exhibiting a reckless disregard for the safety of others, such as failure after knowledge of impending danger to exercise ordinary care to prevent injury or failure to discover a danger through recklessness and carelessness. The term "malicious" refers to a doing of a wrongful act intentionally and without just cause. In the present case the plaintiffs offered no facts which could be construed as supporting their allegations of willful and wanton misconduct.[61]

Therefore, the appellate court upheld the decision of the trial court and dismissed the suit against the teacher and the school district.

Even the seemingly safe activity of dramatic presentations can become involved in tort suits. *Ferreira* v. *Sanchez* (449 P. 2d 784, 1969) involved a shooting in connection with the production of a high school play. A pistol capable of firing live ammunition was being used as a prop for the play. The gun was kept in the principal's desk when not in use. Only the two pupils who used the gun during the play were permitted to handle it. Blanks were used in all of the rehearsals. Somehow, another member of the cast, George Chavez, got hold of the gun, put a live bullet in it, and shot Jackie Ferreira. Ferreira's mother sued the pupil who shot the gun, the teacher supervising the play, and the principal. At the trial, the suits against the teacher and the principal were dismissed, but there was judgment against the pupil who shot Ferreira. Ferreira's mother appealed the dismissal of the suits against the teacher and the principal, claiming that:

> A pistol is a dangerous weapon...and its use on school premises created an artificial condition involving an unreasonable risk requiring the exercise of a high degree of care by the school authorities. They argue that the court applied the ordinary care test and, according, applied an erroneous rule of law requiring reversal.[62]

Essentially, the New Mexico Supreme Court was forced to decide the case on the basis of various degrees of negligence. The Ferreiras claimed that the use of a gun required a higher standard of care than was present. However, the New Mexico high court found that the standard of normal negligence was proper in this case. It also found neither the teacher nor the principal negligent:

> We must recognize the impossibility of a teacher supervising every minute detail of every activity during the preparation and presentation of the class play. After reading the entire record we cannot say, as a matter of law, that the intervening act of George Chavez was reasonably foreseeable by the teachers.[63]

What of nonpupil injuries that occur on school property? Three cases deal with the issue. The first involves an injury to an elderly woman who fell down a flight of unlit stairs outside a school's community room.[64] The Kansas Supreme Court found that the school was not liable for injuries occurring during functions that were "governmental" in nature. Even though the school board charged a nominal three-dollar fee for use of its facilities, the court ruled that use of the community room was governmental in nature and hence that the school was not liable, stating:

> The school board and its employees were operating a high school building, which is a governmental function. We must not place a too narrow restriction on the use of school buildings. They are occupied little enough during the course of a year. School buildings are maintained for educational purposes. Education embraces either mental, moral, or physical powers and facilities. Education is not limited to children. The middle-aged or the aged may also benefit. We would not say that a school board encouraging, or a school building used for, debate societies, musicals, future home-makers, home demonstrations, etc., is extending activities beyond those anticipated in our schools and educational system insofar as the activities do not interfere with the usual educational program and are not commercial in nature.[65]

Even though the school charged a fee, the court found that minimal charges, alone, do not alter the governmental function.

> The argument that the nominal charge left a profit consituting a commercial enterprise after considering lights, janitor service, kitchen furnishings, dishes, tables, dining room, and wear and tear on each, is not convincing even though a substantial amount has accrued in the community room fund.[66]

In the second case a policeman was injured when he fell through the ceiling of a school while searching for intruders in the school's attic.[67] The trial court held the school district liable, but the Nebraska Supreme Court reversed, stating that the policeman could sue only if the school knew or should have known of an unsafe condition. Such knowledge would have required the school either to warn the policeman or to fix the unsafe condition. But the Nebraska high court held that since the attic of the school was not accessible to pupils, the school did not know of the unsafe condition and could not be reasonably expected to have known about it.

The third case involving nonpupil injuries is *M. Cheynez* v. *City of New York* (366 N.Y.S. 2d 21, 1975). In this case a teacher was seriously injured while attempting to open a defective window in her classroom. A trial court dismissed a suit for damages brought by the teacher, but the New York Supreme Court ruled that the trial court erred in dismissing the suit and ordered a new jury trial to consider the evidence.

In-School Injuries

Finally, a quite interesting and slightly amusing case: *Central School District #3* v. *Insurance Company of North America* (391 N.Y.S. 2d 492, 1977). Ernest Sandor, a high school teacher, was given the duty of serving as treasurer for all student activities accounts. An audit revealed $11,840.87 missing in the school's funds. Sandor claimed that $6,500 of the money was stolen from beneath the front seat of his car while he was visiting a local tavern after school. Sandor was bonded by the Insurance Company of North America. The school district sued both Sandor and the insurance company for $5,343.87 and Sandor for $6,500. The trial court also allowed the insurance company to sue Sandor to recover the $5,343.87 it had to pay the school district. The entire case was appealed to the New York Supreme Court, Appellate Division. This court found Sandor liable to the school district for the entire amount, saying:

> Although this record contains no evidence that the missing funds were used for Sandor's benefit, plaintiff is nonetheless entitled to judgment against him in the sum of $11,840.87. Sandor was obliged to meet the standard of ordinary care in safeguarding the funds.[68]

The court found that Sandor did not use ordinary care in safeguarding the funds. Indeed, it was uncertain whether Sandor's car was locked when the $6,500 was allegedly stolen from it.

Summary

While cases presented in this chapter are diverse and the decisions sometimes contradictory, they suggest certain generalizations. The key to in-class injuries cases seems to be the doctrine of foreseeability and the reasonable man. Would the reasonable teacher have been able to foresee the injury that occurred and therefore prevent it? In most cases the courts found the teachers' actions reasonable. In a few cases the courts decided that this question is appropriate for jury decision. As we know, the jury system often results in inconsistent decisions, at least in tort cases.

Teacher absence is *not* in most cases, proximate cause of an injury. The courts seem unwilling to assume that merely because a teacher is absent from the classroom, he or she is guilty of negligence. Individual circumstances of an incident seem determinative in such cases.

The general rule regarding injuries that occur in hallways, stairwells, etc., is that educators owe only a duty of general supervision, unless knowledge of a dangerous or potentially dangerous situation requires specific supervision. Defective windows and doors can cause educators to be liable if the defect went unrepaired for a considerable period of time. School buildings and premises should be inspected every 30 days and defects corrected as soon as possible—i.e., almost immediately. All windows in school buildings should use reinforced glass, glass with imbedded wire mesh, or plexiglass.

Courts are not apt to hold educators responsible for injury (or death) to pupils who are truant from school or class. The courts assume that educators cannot foresee abduction and murder. However, this fact does not absolve educators of their duty to provide reasonable supervision. The courts merely hold that it is unreasonable to foresee death when a pupil is truant.

Liability is frequently incurred in the school cafeteria. The courts want to see properly supervised and well-kept facilities.

Playground equipment that is properly maintained and not defective is not considered an attractive nuisance by the courts, and there is no duty to supervise such areas after school and on weekends. However, if the equipment is defective, the school or its employees can easily be found liable. During recess the presence of a supervisor appears to be critical. In cases where there was no supervision, the courts have held the schools liable. There is no absolute rule regarding what constitutes an adequate pupil/teacher ratio. One court suggested that 40 or 50 to one was adequate.[69] The use of teachers' aides also appears to be quite acceptable to the courts.

The courts treat handicapped pupils much like normal pupils, so long as the degree of supervision is commensurate with their disability. There seems to be no special rule or standard in cases involving handicapped pupils.

Visitors, teachers, and other adults who are injured on school premises appear to have more difficulty in winning liability suits against schools than do pupils. Unless there is blatant, gross negligence on the part of the school, or unless an obviously unsafe condition has existed for some time, most courts appear to hold adults to a higher standard of self-protection and self-reliance than pupils.

Notes

1. 395 F. Supp. 294, M.D.N.C. (1975), aff'd 423 U.S. 907 (1976).
2. Illinois Code s24-24 and 34-84a.
3. *McCauley* v. *Chicago Board of Education* 384 N.E. 2d 100 (1978).
4. *Woodman* v. *Litchfield Community School District #12* 242 N.E. 2d 780 (1968).

In-School Injuries

5. *McGahee* v. *Dade County Board of Public Instruction* 279 So. 2d 87 (1973).
6. Ibid.
7. *Wentz* v. *Deseth* 221 N.W. 2d 101 (1974).
8. *Chavez* v. *Tolleson Elementary School District* 595 P. 2d 1017 (1979).
9. Ibid.
10. *Ohman* v. *Board of Education of the City of New York* 90 N.E. 2d 474 (1949).
11. Ibid.
12. Ibid.
13. *Segerman* v. *Jones* 259 A. 2d 794, 256 Md. 109 (1969).
14. *Richard* v. *St. Landry Parish School Board* 344 So. 2d 1116 (1977).
15. Ibid.
16. Ibid.
17. *Schnell* v. *Travelers Insurance Company* 264 So. 2d 346 (1972).
18. Ibid.
19. Ibid.
20. *Clay* v. *Chicago Board of Education* 318 N.E. 2d 153, 22 Ill. App. 3d 437 (1974).
21. *Cotton* v. *The Catholic Bishop of Chicago* 351 N.E. 2d 247 39 Ill. App. 3d 1062 (1976).
22. *Poynter* v. *Kankakee School District #111* 370 N.E. 2d 667, 55 Ill. App. 3d 46, 12 Ill. Dec. 863 (1977).
23. Ibid.
24. *Tyler* v. *Jefferson Parish School Board* 258 So. 2d 206 (1972).
25. Ibid.
26. Ibid.
27. *Johnson* v. *Orleans Parish School Board* 261 So. 2d 699 (1972).
28. *Lewis* v. *St. Bernard Parish School Board* 350 So. 2d 1256 (1977).
29. Ibid.
30. Ibid.
31. *Lauricella* v. *Board of Education of City of Buffalo* 381 N.Y.S. 2d 566 (1976).
32. Ibid.
33. *Osborn* v. *Lake Washington School District* 462 P. 2d 966 (1969).
34. *Kingsley* v. *Independent School District #2, Hill City* 251 N.W. 2d 634 (1977).
35. *Prier* v. *Horace Mann Insurance Company* 351 So. 265 (1977).
36. Ibid.
37. *Forgnone* v. *Salvadore Union Elementary School District* 106 P. 2d 932 (1940).
38. Ibid.
39. Ibid.
40. *Dailey* v. *Los Angeles Unified School District* 470 P. 2d 360, 87 Cal. Rptr. 376 (1970).
41. *Sansonni* v. *Jefferson Parish School Board* 344 So. 2d 42 (1977).
42. *Becker* v. *Beaverton School District #48* 551 P. 2d 498 (1976).
43. *Chimerofsky* v. *School District #63* 257 N.E. 2d 480 (1970).

44. Ibid.
45. Ibid.
46. *Hall* v. *Columbus Board of Education* 290 N.E. 2d 580, 32 Ohio App. 2d 297 (1972).
47. Ibid.
48. *Sheehan* v. *St. Peter's Catholic School* 188 N.W. 2d 868 (1971).
49. *Fagan* v. *Summers* 498 P. 2d 1227 (1972).
50. Ibid.
51. *Capers* v. *Orleans Parish School Board* 365 So. 2d 23 (1978).
52. *Sears* v. *City of Springhill* 303 So. 2d 602 (1974).
53. Ibid.
54. *McDonald* v. *Terrebonne Parish School Board* 253 So. 2d 558 (1971).
55. Ibid.
56. Ibid.
57. *Whitney* v. *City of Worcester* 366 N.E. 2d 1210 (1977).
58. *Hunter* v. *Evergreen Presbyterian Vocational School* 338 So. 2d 164 (1976).
59. Ibid.
60. *Gordon* v. *Oak Park School District #97* 320 N.E. 2d 398 (1974).
61. Ibid.
62. *Ferreira* v. *Sanchez* 449 P. 2d 784 (1969).
63. Ibid.
64. *Smith* v. *Board of Education of Caney School District #34* 464 P. 2d 571 (1970).
65. Ibid.
66. Ibid.
67. *Nared* v. *School District of Omaha* 215 N.W. 2d 115 (1974).
68. *Central School District #3* v. *Insurance Company of North America* 391 N.Y.S. 2d 492 (1977).
69. *Capers* v. *Orleans Parish School Board* 365 So. 2d (1978).

III

Away-from-School Injuries

Pupils may easily be injured when away from school but still under the school's supervision. Such injuries may occur in a variety of circumstances. However, most of the cases fall into three broad categories: injuries that occur on field trips or other events sponsored by the school yet away from school premises; injuries that occur as pupils go to and from school; and injuries that occur on, near, or because of school buses.

For many years, educators have claimed that they have disciplinary control over the pupils while they are on the way to school, during school field trips, and on the way home. Justifications for such claims are, first the *in loco parentis* doctrine and, second, the assumption that school trips and travel to and from school are basically "school-sponsored." The courts have accepted these justifications but add that if the school's scope of disciplinary control extends into these areas, then so does the school's liability.

Field Trips

There are three categories of people who enter another person's property: licensees, invitees, and trespassers. A licensee is a visiting party who requests from the owner permission to enter. An invitee is invited onto the property by the owner. And a trespasser is someone who enters property without permission. Courts have had to consider which category pupils fall into when they are on field trips. Owners or proprietors owe a higher duty to invitees than to licensees, because the owner initiated the entry. Most courts have held, however, that pupils on field trips are licensees, not invitees. This means that when pupils visit establishments on a school-sponsored field trip, the owners owe a lesser standard of care to the pupils than to people they invite onto their property.

Most school systems make the pupils' parents sign "liability release" forms before allowing pupils to go on a field trip. In most states such release forms are worthless, as noted in Chapter I. The courts have held that educators cannot be released from liability due to negligence. While release forms offer little or no legal protection, they do serve as parental permission forms and sometimes deter parents from suing. In any event, educators should not count on release forms for protection against liability suits.

When taking teenagers on field trips, it is vital to provide proper supervision at all times. Two cases that involve drowning illustrate this point.

Morrison v. *Community Unit School District #1* (358 N.E. 2d 389, 1976) concerns a near drowning by a high school pupil while on a field trip. The pupil, age 15, was a member of a school club that took an extracurricular outing at a private club. The private club had a swimming pool and allowed each pupil who paid a one-dollar admission fee to swim. The pupil testified that he jumped into the pool at a place where the depth was indicated to be five feet. The youth apparently could not swim and went under. One of his friends saw him under the water in the 12-foot-deep section of the pool and pulled him out. The pupil and parents sued the school district for negligence. The court immediately determined that there was at least one lifeguard on duty in the swimming pool at the time of the accident. Also, the court concluded that the pupil had eaten a large meal just before swimming and jumped into the pool knowing that he did not know how to swim. The trial court judge dismissed all charges against the school district. The pupil appealed that court decision to the Illinois Appellate Court, which sustained the trial court finding. The appeals court ruled that there was proper supervision and that the pupil both knew better than to jump into a pool in deep water when he could not swim and that he should not have eaten a large meal before going into the pool.

In a similar case, an 18-year-old high school senior, Charles Cox, drowned while attending a school-sponsored outing at a Kentucky state park.[1] Two teachers were supervising the 30 high school pupils who went on the trip. The beach at the park, however, had no lifeguard or lifesaving equipment on hand. Evidence indicates that, while wearing street clothes, Cox attempted to swim to a diving platform located 40 yards from the shore. He failed to reach the platform. Repeated rescue attempts by fellow pupils, one of the teachers, and people in a passing boat were futile.

Cox's parents brought suit against the school district, the principal who authorized the trip, and the two teachers who supervised it. A Kentucky court ruled that the principal shifted his liability to the two teachers when he placed them in charge of the trip, as follows:

> We have said when a principal of a school is personally negligent he may be held responsible for injuries resulting therefrom. It appears to us that Dennington [the principal] had fulfilled his duty when he gave appropriate instructions and specified certain conditions under which the trip might be taken. He was guilty of no negligence.[2]

Away-from School Injuries

A court of appeals also ruled that the two teachers were not negligent, even though they did carry out the principal's directives regarding supervision. The court stated that the pupil was an adult under the laws of Kentucky and endangered his own well-being. In other words, Cox was contributorily negligent. The appeals court said: "It appears to us that there was no evidence whatsoever that after the peril in which Charles placed himself was discovered or was discoverable, Mr. Hooks or Mrs. Barnes had time to do anything to have averted the harm which befell him."[3]

A 1972 case from Texas illustrates the legal concepts of acts of God and assumption of risk.[4] A 15-year-old girl, Deborah Moore, was injured during a school outing at a ranch. Moore elected to go horseback riding while at the ranch. Because of her inexperience, she was assigned a reasonably "calm" horse. While on the ride, however, the horse bolted when approached from the rear by the wrangler who was supervising the ride. The horse eventually collided with a barbed wire fence, throwing Moore to the ground and causing an ankle injury. Deborah sued the ranch's owner, alleging that her horse was too "spirited" for her and that the wrangler had caused the horse to bolt by carelessly approaching the horse from the rear. The Texas Court of Civil Appeals upheld a jury finding that the injury was the result of an "unavoidable accident" and that Moore, in the exercise of ordinary care, should have known and appreciated the dangers usually incident to horseback riding.[5] Therefore, the court upheld the ranch attorney's defenses, based on the act of God and assumption of risk concepts.

The Minnesota Supreme Court upheld a jury's finding against a school division in an interesting case in 1978.[6] Central High School was experiencing racial tension in 1972. In an attempt to reduce such tension, the school required all pupils to attend a movie at a local theater. The movie, "King," depicted scenes of racial violence. During the showing of the movie, derogatory racial comments were made by both black and white pupils in the audience. When the movie ended, there was significant racial tension as the pupils exited the theater. Cynthia Raleigh, a white female pupil, had her wrist slashed by a black female pupil as she crossed the theater lobby.

Raleigh's mother filed suit against the school district, alleging negligent supervision by the school district at the time of the assault and the creation of a situation in which it was reasonably foreseeable that an occasion for injury to others might arise. The jury ruled in favor of the pupil. The school district appealed the decision to the Minnesota Supreme Court.[7] That court upheld the jury's decision, finding that the circumstances surrounding the activity would lead reasonable people to foresee a potential for trouble. The school should have provided more teachers to supervise an activity that had the potential for danger, the court ruled, saying: "Reasonable supervision might prevent sudden injuries, of course, not only by interrupting it but also by deterring it altogether.[8]

The New York Supreme Court held a school district liable for the death of a child during a school-sponsored trip.[9] The school allowed its seniors to go on a trip to a local park to take senior class pictures. One senior pupil wanted his picture taken with his motorcycle and was allowed to bring it. As he was returning to the parking lot, the pupil hit and killed a child with the motorcycle. The jury found the school district liable, stating that the child could not be contributorily negligent, since he did not know of any dangerous or unsafe condition.

A 1976 case from California sanctioned an interesting law that affects the liability of field trips. Section 1081.5(d) of the California Education Code states:

> All persons making the field trip or excursion shall be deemed to have waived all claims against the district or the state of California for injury, accident, illness, or death occurring during or by reason of the field trip or excursion. All adults taking out-of-state field trips or excursions and all parents and guardians of pupils taking out-of-state field trips or excursions shall sign a statement waiving such claims.[10]

However, *Castro* v. *Los Angeles Board of Education* (54 Cal. App. 3d 232, 126 Cal. Rptr. 537, 1976) challenged that statute. The case concerns the death of a high school junior while at R.O.T.C. summer camp. The R.O.T.C. program was organized and sponsored by the Los Angeles Board of Education. The parents of the pupil sued the school division, alleging that Section 1081.5 speaks to field trips and excursions made on a voluntary basis. The pupil who was killed was required to attend R.O.T.C. summer camp. The California court accepted the reasoning of the parents and allowed the suit. The court stated that school boards are liable for injuries if an activity is *not* voluntary:

> Not all educational facilities can be provided within the confines of each school's property. To accomplish a school's educational aims, it therefore is necessary for students to accomplish portions of their study off the school's property. Students who are off of the school's property for required school purposes are entitled to the same safeguards as those who are on school prop-

> erty, within supervisorial limits. Students who participate in nonrequired trips or excursions, though possibly in furtherance of their education but not as required attendance, are effectively on their own; the voluntary nature of the event absolves the district of liability.[11]

Therefore, school districts in California are liable for injuries incurred on required field trips. It is also interesting to note that there appears to be a legal difference between a "field trip" and an "excursion." The court explains the difference as follows:

> "Field trip" is defined as a visit made by students and usually a teacher for purposes of first-hand observation (as to a factory, farm, clinic, museum). "Excursion" means a journey chiefly for recreation, a usual brief pleasure trip, departure from a direct or proper course, or deviation from a definite path.[12]

In *Arnold* v. *Hafling* (474 P. 2d 638, 1970), a Colorado high school pupil broke his leg when another pupil pushed him off a six-foot retaining wall and into a shallow stream. The injury occurred during an outing of the Letterman's Club at the coach's mountain cabin. The coach and the school principal were supervising the outing. The pupil's parents filed suit, alleging that the coach and principal were negligent in not providing adequate supervision. The trial judge dismissed the suit, and the parents appealed the decision to the Colorado Court of Appeals. The court upheld the decision of the trial judge, basing the opinion on the theory that the older the pupils are, the less supervision is needed. The court said: "The students involved here were not elementary school children. Rather, they were between the ages of 16 and 18, and it would be expected that they would be more responsible and require less supervision than elementary school children."[13] This ruling is interesting, because essentially the Colorado court applied the principles of the Rule of Seven (see Chapter I) to the duty to supervise.

Sumter County v. *Pritchett* (186 S.E. 2d 798, 1971) is a case that involves the death of a pupil, Johnny Pritchett, while he was riding in a school driver education car on the way to a basketball tournament over Christmas break. Sumter County had a policy that "driver education cars are to be used for driver education purposes only and during school hours"; however, the school principal, Ben Strickland, who was also killed in the crash, was driving the car.

Pritchett's parents brought suit against Strickland's estate and the school system. The trial court ruled that since the principal was using the car for an unauthorized purpose, he and the county were liable. However, the Georgia Court of Appeals reversed the decision. They found Strickland worked for and under the board of education and that the board of education had knowledge of Strickland's unauthorized use of the car and thus consented to its use. Therefore, the court found that since the principal was using the car (even though for unauthorized purposes), it was a school trip and that the trial court should have ruled for Sumter County.

The Alaska Supreme Court ruled on a case relevant to this discussion in 1977.[14] Pupils who were participating in a wrestling tournament were excused from school if the parents consented and agreed to provide transportation from the tournament to their homes. The school's consent form made it clear that the tournament was *not* a school-sponsored trip. Claude Sharp, a fourth-grader, attended the tournament. A friend's mother, Frances Frey, was enlisted to take Sharp and his friend Marty Frey to lunch. On the way to lunch Mrs. Frey stopped at her husband's service station and asked the boys to fill the car's gas tank. The boys splashed some gasoline on their pants legs. Mrs. Frey told the boys to get into the car and allow the gasoline to evaporate. While inside the car, Marty Frey picked up a book of matches and lit Claude Sharp's pants leg. By the time Sharp jumped out of the car and into a mud puddle he had sustained second and third degree burns on his right leg.

Claude's parents filed suit against the Freys and the school district. The suit against the Freys was settled out of court. However, the trial judge dismissed the suit against the school district. The parents appealed the case to the Alaska Supreme Court. The high court felt that the school district's alleged negligence of supervision was not the proximate cause of injury. It was the Freys' behavior that caused the injury. Therefore, the court upheld dismissal of the suit against the school division.

Field trips are high-liability events because of increased chances of injury. However, educators can protect themselves in several ways. Before taking pupils on a field trip, teachers should inspect the sites to be visited to judge their safety. Parents should be asked to sign release forms before their children go on the trip. While the legal protection of such forms is minimal for the school (except in California), they at least act as a permission form. Courts tend to hold educators more liable for field trips that are required than for voluntary trips. The number of teachers making a trip should be more than sufficient for minimal supervision. The younger the pupils, the more adult supervisors are needed. Specific instructions—what to do and what not to do—should be given to the supervisors as well as to the pupils.

Going to and from School

This section will deal with cases of injuries that occur to pupils either on the way to school or on the way home from school but are not related to school buses. There are a variety of instances when pupils can be injured—even killed—in such circumstances. There are also several famous cases in educational tort law in this area.

One of these famous cases is *Miller* v. *Yoshimoto* (536 P. 2d 1195, 56 Hawaii 333, 1975), which was decided by the Hawaii Supreme Court in 1975. The case involved an injury to a middle school pupil as she was leaving school. As Helen Miller was walking through the school campus with a friend on her way home, she saw rocks being thrown between two of the buildings on the school property. She recognized two of the boys who were throwing the rocks and asked them to stop so that she could pass. The boys began to tease her and throw rocks at her and her friend. As she walked between the pupils, a rock thrown by one of the boys hit her in the left eye. The entire eye had to be removed from the socket; an artificial eye was later inserted. She sued both the boy who threw the rock and the school district for not providing adequate supervision. The major concern in this case was the issue of adequate supervision. The Hawaii Supreme Court, in examining this issue, found as follows:

> ...[I]t is widely recognized that the pupil school systems have a duty of reasonable supervision of students intrusted to them.
>
> We agree with the above view and conclude that the (school) has a duty of reasonably supervising the public school students of Hawaii during their required attendance and presence at school and while the students are leaving school immediately after the school day is over. And, in our opinion, the duty of reasonable supervision entails general supervision of the students, unless specific needs, or a dangerous or a likely to be dangerous situation calls for specific supervision. The duty of reasonable supervision does not require [the school to provide] personnel to supervise every portion of the school building and campus area.[15]

The court therefore held the school not liable. Educators had been on duty at the time of the injury. Since there was no previous indication of an unsafe condition or circumstance, there was no need for increased or constant supervision by the school in every school area.

Titus v. *Lindberg* (228 A. 2d 65, 1967) is another famous case concerning supervision. Robert Titus, a 9-year-old pupil, rode his bicycle to school one morning at about 8:05 a.m. (School began at

8:15.) As he entered the school parking lot, he was struck in the eye by a paper clip shot by Richard Lindberg, a 13-year-old. Lindberg's reputation among school personnel was that he was "rough and a bully." At the time of the incident, he was waiting to be picked up by a school bus and taken to his own school elsewhere. During the wait, he was shooting at other pupils with a rubber band and paper clips. At no time did the school board assign personnel to supervise at this bus stop. The principal of the school was inside the building at the time of the injury. He routinely arrived at school at approximately 8:00 a.m. As he was walking through the school building, he looked outside, saw the injury, and immediately went to give help. Titus's parents brought suit against Lindberg, the principal, and the school board. The trial court found all three defendants guilty of negligence: Lindberg as the chief negligent party, the principal as having failed to provide supervision, and the school board as having failed to assign personnel to the area where many students gathered. The principal and the school board appealed the trial court decision. The trial court had awarded damages totalling $41,000 to be paid by the three defendants. The New Jersey Supreme Court immediately found that Lindberg was obviously liable for the injury. At issue in the appeal was the liability of the principal and the school board. The principal claimed that since his duties did not begin until 8:15 a.m. he should not be held liable for an injury that occurred prior to that time. The court ruled otherwise, stating that by his presence on the school premises at 8:00 a.m., he assumed supervision of the area. The court also found that he knew the Lindberg pupil and his reputation, yet was not outside supervising the area. The court therefore found the principal to be negligent. It also found the school board to be negligent, saying that since the school was a dropping off point for buses, the board should have authorized assigning personnel to the area. The court noted that "the dangers and the need for supervision were evident, yet the board apparently made no supervisory plans and took no precautions."[16]

Thus the New Jersey Supreme Court supported the trial court, holding all three defendants liable for negligence. The most significant aspect of this case is the ruling that educational personnel can assume liability for supervisory duties by their mere presence, whether or not they are within their contractual time limits. They do not relinquish supervisory responsibility when at school before or after regular hours. In fact, supervision does not appear to be connected with any element of a teaching contract.

Another classic is a "snowball" case occurring in New York City. In *Lawes* v. *Board of Education of City of New York* (213

N.E. 2d 667, 266 N.Y.S. 2d 364, 16 N.Y. 2d 302, 1965), a pupil was injured when struck in the eye by a snowball on the way to school. The snowball was thrown on school property, violating a school regulation prohibiting the throwing of snowballs. The pupil who was hit sued the school system, claiming that the school should have provided more supervision than it did. The trial court rendered judgments totalling $45,000 against the board of education. The board appealed to the New York Court of Appeals, which dismissed the suit, saying:

> No one grows up in this climate without throwing snowballs and being hit by them. If snow is on the ground as children come to school, it would require intensive policing, almost child by child, to take all snowball throwing out of play. It is unreasonable to demand or expect such perfection in supervision in ordinary teachers or ordinary school management; and a fair test of reasonable care does not demand it.[17]

The appeals court stated that teachers cannot be expected to supervise every minute of every day, that the school had a regulation against throwing snowballs, and that the teachers enforced it as often as they could. There was not an unreasonable lack of supervision in this instance. The court added:

> A school is not liable for every thoughtless or careless act by which one pupil may injure another.... Nor is liability invariably to fall on it because a school rule has been violated and an injury has been caused by another pupil.[18]

A district court of appeals in Florida ruled in 1976 that a school district and a school principal are not liable for injury when a pupil assaults another pupil on the way home from school.[19] Samuel Geter, who was known by school authorities to have violent propensities, was suspended from Sanford Middle School by the principal for causing a disturbance in school. Later, Geter assaulted William Oglesby, a fellow pupil at Sanford, who was walking home. Oglesby eventually died from injuries he sustained in the assault. Oglesby's parents brought suit against the school district and principal, alleging negligent supervision of the suspended pupil. The court ruled that once the pupil was suspended and removed from school grounds, the liability of the principal and school district ceased:

> We simply hold that where a public school student has been suspended from a school and has been removed from the school

> grounds and all school-related facilities and programs, neither the school board nor the supervising principal of the school has any further duty to supervise or oversee the conduct of such suspended student at locations which are off campus and which are non-school-related.[20]

The court did limit its ruling, however, to off-campus incidents, stating that an assault by one pupil within school facilities or on school grounds could constitute liability.

In 1977 the Maryland Court of Appeals upheld a jury verdict of not negligent in an injury suit where circumstances were similar to those of the Geter/Oglesby case.[21] There had been several weeks of racial tension at the junior high school that Keith Lunsford attended. On the day of the injury, he purchased a ticket to attend a school baseball game (which allowed him to leave school early). But instead of attending the game Lunsford started home, using a short cut through a woods near the school. He was assaulted and seriously injured in the woods by 17 to 20 black pupils. His mother brought suit against the board of education, the principal of the school, and the school security guard. The trial jury found all of the defendants not negligent. Lunsford's mother appealed the finding of the jury, claiming that contributory negligence could not be used as a defense, since Lunsford was unaware of the dangers. The Maryland Court of Appeals disagreed, stating:

> ...[W]e think that there was ample evidence from which the jury could have found negligence on Keith's part. Keith's own testimony was that he had heard rumors of impending violence at the school for a week or 10 days.
>
> It was Keith who decided to walk home through the woods, to continue his approach to a group of students whom he saw at the far end of the school property, instead of remaining on the ball field or returning to the school, which were the only places where he had a right to be.[22]

Consequently, the appellate court upheld the jury's finding of non-negligence.

In 1974 the South Carolina Supreme Court relied on that state's sovereign immunity statute to dismiss a suit brought against the school district for wrongful death.[23] An 8-year-old girl was killed by a truck while she was walking home from school. School authorities had kept the pupil after school and did not release her until bus transportation was no longer available. The parents filed suit, alleging that the school was recklessly negligent in subjecting their child to hazardous traffic conditions. In South Carolina, however, school boards enjoy sovereign immunity. Consequently, the suit was dismissed.

Florence v. *Goldberg* (375 N.E. 2d 763, 404 N.Y.S. 2d 583, 44 N.Y. 2d 189, 1978) involved an injury to a child on the way to school. A 6-year-old first-grader was struck by a taxicab at an intersection in New York City, resulting in severe brain damage to the child. At the time of the accident, the child was attempting to cross a street where there was normally a crossing guard provided by the police department. For two weeks prior to this accident, the mother of the child had accompanied him to school daily; during those two weeks a crossing guard had been present each day. Confident that the guard would be present, she did not accompany her child to school on the day of the accident. But the guard was not there. The trial court found the cab company and New York City Police Department guilty of negligence. New York City appealed the trial court's decision, claiming that the police department does not have a duty to supervise the crosswalks. The New York Court of Appeals said:

> We hold that a municipality whose police department voluntarily assumes a duty to supervise school crossings—the assumption of that duty having been relied upon by parents of school children—may be held liable for its negligent omission to provide a guard at a designated crossing or to notify the school principal or take other appropriate action to safeguard the children.[24]

In essence, the court found that since it was common knowledge that there was a crossing guard present at this intersection and since parents relied upon this crossing guard, the police department, in failing to provide a guard on the date of the accident, was indeed negligent. Therefore, the court upheld the trial court verdict of negligence against New York City.

From study of the cases summarized, educators can make some generalizations about their liability for injuries incurred away from the school grounds. Courts seem to be reluctant to hold educators liable when pupils are assaulted or injured on the way to or from school. Even though the South Carolina Supreme Court dismissed the suit in *Graham* v. *Charleston*,[25] educators must remember that the dismissal was based on South Carolina's sovereign immunity statute. Only eight to 10 states have such statutes. Indeed, it is quite conceivable that courts elsewhere would have found the educator negligent in keeping a young pupil after school until after the school buses were gone, then allowing the pupil to negotiate hazardous traffic on her own. Most courts would find such actions unreasonable.

Two factors must be considered before keeping pupils after school until school buses are gone. First is the age of the pupil. The older the pupils, the more able they obviously are to get home on their own. Under no circumstances should elementary school pupils (who normally ride a school bus home) be allowed to walk home after detention. The second factor is the distance and type of terrain the pupils must cover on their own. Even for high school pupils, it might be unreasonable to expect them to walk distances or cross dangerous highways or intersections in order to get home. Educators must be reasonable in their expectations of pupils. After all, any reasonable educator could easily forsee that a 15-year-old pupil might be injured while attempting to walk 10 or 12 miles home in a major city.

School Bus-Related Cases

There are literally thousands of cases involving injuries to pupils on school buses, leaving school buses, or waiting for school buses. Almost every state has had sad reports of pupils being killed in school bus-related accidents. Overall, however, school buses have an extremely good safety record, considering the pupil miles traveled and the type of rider involved.

In 1977 an appellate court in Massachusetts upheld a finding of negligence against a school system by a jury. *Scott* v. *Thompson* (363 N.E. 2d 295, 1977) involved a 7-year-old elementary school girl, Meredith Scott, who was injured by a truck after she had departed from the school bus. The trial court jury awarded the pupil $65,500 in damages. The school system appealed the case to the Massachusetts Appeals Court.

The evidence indicates that the school bus driver was running ahead of schedule on the day of the injury. At the beginning of his run he parked his bus and went into a garage for a cup of coffee. He left the bus motor running and the door open. While he was in the garage, several pupils boarded the bus. While Scott was on the bus, she saw a friend standing across the street waiting to be picked up by the bus. Scott left the bus and was hit by the truck while crossing the street. The parents sued the school district, alleging that the school bus driver was negligent in leaving the bus unattended. There is evidence that the driver was aware of school safety regulations prohibiting school bus drivers from leaving a bus unattended with children aboard. The court found in favor of the pupil and upheld the verdict of $65,500. The court felt that there was a causal connection between the bus driver's negligence and the pupil's injuries.

In a similar case, the North Carolina Court of Appeals also upheld a damage award against a school district.[26] The parents of a six-year-old first-grader brought suit against the school division for the death of their child. The accident occurred during the first week of school. There had been numerous bus scheduling mixups. On the day of the accident, the bus was taking a new route home. It stopped on the road to discharge the child and several other pupils. For the first time, he had to cross the street leading to his house. After the bus pulled off, he attempted to cross the street, was almost hit, backed up onto the curb, then ran across the street. He was hit and killed by a pickup truck heading in the opposite direction.

The parents filed suit against the school for negligence. Damages amounting to $15,000 were awarded. The school system appealed the decision to the North Carolina Court of Appeals. The appeals court affirmed the judgment of the trial court and upheld the suit against the school system.

Courts have generally ruled that school systems operating buses have a duty to use the stop lights on the buses while pupils are disembarking. A famous 1938 case, *Taylor* v. *Patterson's Administrator* (114 S.W. 2d 488, 272 Ky. 415, 1938), established this legal precedent:

> ...that the transporter of school children [is] required to exercise the highest degree of care for a child's safety *until the child [is] on the side of the street where his home [is] located and [is] out of danger of injury from passing traffic*. (Emphasis added by court.)
>
> Before stopping the school bus and while loading or discharging school children, the driver *shall* open out the [stop] sign so that it will be plainly visible to traffic approaching from both directions.[27]

Croghan v. *Hart County Board of Education* (549 So. 2d 306, 1977) is a recent case from Kentucky that follows the legal precedent established in the *Taylor* case. The Kentucky Court of Appeals found a school bus driver negligent when he discharged an 11-year-old pupil without using the stop lights on the school bus. The pupil was severely injured in attempting to cross the street without the warning by the bus driver to stop traffic for him.

A Michigan appeals court used the doctrine of sovereign immunity to protect a school district from a school bus suit.[28] A 9-year-old boy was severely injured when he was walking to the school bus stop. The parents sued, alleging that the school bus route was negligently laid out and that consequently the school bus stop was negligently placed. The Michigan court ruled that laying out school bus routes and designating school bus stops are government functions that enjoy immunity under Michigan's sovereign immunity statute.

Mitchell v. *Guilford County Board of Education* (161 S.E. 2d 645, 1968) is a case where an 11-year-old seventh-grade pupil was run over by a school bus. Apparently, the pupil was coming out of school to get on the bus. He slipped on an icy sidewalk and fell underneath the rear wheels of his bus, which was moving at about 10 miles an hour. The bus driver claimed that the road was icy and that he could not stop. The Industrial Commission found the driver to be negligent in operating the bus and awarded damages to the pupil. The court found that usually there were teachers on duty, supervising the pupils being loaded on the school buses. On this day there were none. However, this was not a major factor in the decision. The court ruled in favor of the student and against the bus driver. It found that the driver was negligent and that such negligence was the proximate cause of the accident and injury. The school district attempted to use contributory negligence as a defense, but the court rejected the argument, stating: "The plaintiff, John P. Mitchell, was 11-years-old. He is presumed to be incapable of contributory negligence."[29]

A very famous school bus case occurred in Illinois in 1959. *Molitor* v. *Kaneland Community Unit School District #302* (163 N.E. 2d 89, 1959) involved an injury to a pupil when a school bus hit something, overturned, and exploded. The parents of the injured pupil sued, alleging negligence. However, the school district claimed sovereign immunity. The Illinois Supreme Court ruled in favor of the pupil, finding sovereign immunity to be an untenable legal principle:

> We are of the opinion that school district immunity cannot be justified... As was stated by one court, "The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation."[30]

This case is extremely important, because it was one of the first cases challenging state sovereign immunity. The success of this case opened the doors to litigation in many other states, and this eventually led most states to abrogate their sovereign immunity either legislatively or judicially.[31]

Two other well-known school bus cases were decided within a year of each other by the same North Carolina court. *Childs* v. *Dowdy* (188 S.E. 2d 638, 1972) concerns the death of a pupil in a school bus accident. Gary Childs, a 14-year-old eighth-grader, was riding in a school bus when the bus was hit on the side by an automobile. Childs was thrown through an open door in the bus and onto the street, receiving injuries that contributed to his death. The parents sued in a jury trial, claiming negligence on the part of the driver of the automobile as well as the bus driver, who had allowed pupils to stand on the bus. Also, the bus driver was sued for not keeping a proper lookout and for failing to keep the bus under proper control and speed. The jury found both defendants guilty of negligence, denied contributory negligence, and awarded damages. The bus company appealed to the North Carolina Court of Appeals, claiming that their company was not liable, that the bus was being driven in a safe manner, and that the issue of contributory negligence must be re-examined. The court found, even in this long and complicated case, that a new jury trial should be convened to answer the bus company claims. The appeals court upheld the trial court's verdict of guilty against the driver of the car but ordered a new trial to determine the guilt and negligence of the bus company.

In the very next year, the same North Carolina court ruled on another interesting school bus case. In *Sparrow* v. *Forsyth County Board of Education* (198 S.E. 2d 762, 1973) a pupil was injured on the school bus on the way home from school. The pupil got on the bus and went to a rear seat. The bus driver made several stops on the way home. On the stop before the pupil was supposed to get off, he got out of his seat in the rear and was moving to the front of the bus to take an unoccupied seat. This was unknown to the bus driver. The driver was moving the bus forward at approximately 10 miles an hour, when a snowball came through the open window next to the driver and hit him in the head. The driver slammed on the brakes, which brought the bus to a stop and threw the pupil forward, causing him to hit his head and chest against the back of a seat. After the driver stopped the bus, he opened the door, went outside, and threw a snowball at the pupil who had hit him. When he arrived back in the bus, he found that the pupil who had been thrown to the floor was injured.

The court found that the school bus driver:

> ...acted as a person of ordinary care and prudence would have acted under similar circumstances. The snowball being thrown into the bus in front of the driver brought about a sudden emergency which caused the driver to quickly stop the bus. There was, therefore, no negligence on the part of the driver in stopping the bus suddenly.[32]

The court ruled that the fact that the driver threw a snowball after the incident did not indicate negligence on his part.

Therefore, the court ruled in favor of the driver and the school system and against the pupil who brought the suit.

Observing certain rules will help avoid suits in cases of this kind. Obviously, school bus drivers must be required to use the school bus stop lights when a pupil is boarding or disembarking. The stop lights should remain on until the pupil reaches the side of the road on which his house is located. School divisions should make a special effort to place school bus stops in the safest locations possible. School bus drivers should not allow pupils to stand or change seats on a school bus if it is moving, even at slow speeds. Drivers should be told that, above all, the pupils' safety and well-being are basic priorities.

Notes

1. *Cox* v. *Barnes*, 469 S.W. 2d 61 (1971).
2. Ibid.
3. Ibid.
4. *Moore* v. *Drummet*, 478 S.W. 2d 177 (1972).
5. Ibid.
6. *Raleigh* v. *Independent School District*, 275 N.W. 2d 572 (1978).
7. Ibid.
8. Ibid.
9. *Williamson* v. *Board of Education of Berne-Knox*, 375 N.Y.S. 2d 221 (1975).
10. California Education Code s1081.5(d).
11. *Castro* v. *Los Angeles Board of Education*, 54 Cal. App. 3d 232, 126 Cal. Rptr. 537 (1976).
12. Ibid.
13. *Arnold* v. *Hafling*, 474 P. 2d 638 (1970).
14. *Sharp* v. *Fairbanks North Star Borough*, 569 P. 2d 178 (1971).
15. *Miller* v. *Yoshimoto*, 536 P. 2d 1195, 56 Hawaii 333 (1975).
16. *Titus* v. *Lindberg*, 228 A. 2d 65, 49 N.J. 66 (1967).
17. *Lawes* v. *Board of Education of the City of New York*, 213 N.E. 2d 667, 266 N.Y.S. 2d 364, 16 N.Y. 2d 302 (1965).
18. Ibid.
19. *Oglesby* v. *Seminole County Board of Public Instruction*, 328 So. 2d 515 (1976).
20. Ibid.
21. *Lunsford* v. *Board of Education of Prince George's County*, 374 A. 2d 1162 (1977).
22. Ibid.
23. *Graham* v. *Charleston County School Board*, 204 S.E. 2d 384 (1974).
24. *Florence* v. *Goldberg*, 375 N.E. 2d 763, 404 N.Y.S. 2d 583, 44 N.Y. 2d 189 (1978).
25. *Graham* v. *Charleston County School Board*.
26. *Slade* v. *New Hanover County Board of Education*, 178 S.E. 2d 316, 10 N.C. App. 287 (1971).

Specialized Classes

27. *Taylor* v. *Patterson's Administrator*, 114 S.W. 2d 488, 272 Ky. 415 (1938).
28. *McNees* v. *Scholley*, 208 N.W. 2d 643 (1973).
29. *Mitchell* v. *Guilford County Board of Education*, 161 S.E. 2d 645, 1 N.C. App. 373 (1968).
30. *Molitor* v. *Kaneland Community Unit School District #302*, 163 N.E. 2d 89, 18 Ill. 2d 11 (1959).
31. Eugene T. Connors, "Governmental Immunity and Public Education," *Texas Tech Journal of Education*, vol. 4, no. 3 (Fall 1977), p. 196.
32. *Sparrow* v. *Forsyth County Board of Education*, 198 S.E. 2d 762, 19 N.C. App. 383 (1973).

IV

Specialized Classes

This chapter will examine the tort liabilities involved in conducting various specialized classes. Because of the extremely high volume of litigation involved in athletics areas, they will be discussed separately in Chapter V. One type of class addressed here involves those with laboratories, such as biology, chemistry, physics, and the like. Also considered are vocational/industrial courses, including those in wood and metal working, welding, auto shop, masonry, and agriculture. Of course, the legal principles derived from cases considered here are applicable to other types of specialized classes, even though no specific cases may be cited.

With the possible exception of athletics, there is a higher likelihood of teachers losing suits in this area than in any other field of education. This situation probably results from several factors. First, there is a higher propensity for serious accidents to occur in specialized classes than in normal classroom situations. Second, the equipment is frequently dangerous, requiring the teacher to exercise a much higher standard of care. This higher standard demands much more intense and constant supervision of the pupils. Indeed, science laboratories and vocational shops comprise one of three areas considered to require the highest standard of care in education.

Two other factors are important: proper instruction and maintenance of equipment. As mentioned in Chapter I, teachers of specialized classes must be certain to provide proper instruction in the use of equipment and to document that this instruction was actually provided. Also, because specialized classes deal with so many machines and tools that can cause injury, courts want to be certain that such equipment is always properly maintained. Allowing students to use a machine that is not in perfect operating order may constitute an unreasonable risk. Equipment not in perfect operating order or lacking safety features (e.g., blade guards), should not be used by students.

Specialized Classes

Vocational shops where machines are the primary teaching aids should be equipped with several special features. Each shop should have lock-boxes at strategic locations. A lock-box is an electrical switch whose "off" button, when pushed, will immediately shut down every machine in the shop. Such devices make it possible for the instructor to halt dangerous developing situations immediately without having to shout above the machine noise or run through a large shop area to warn pupils of impending danger.

Every shop should also have a telephone. This is important for two reasons. First, the teacher will not have to leave the shop area to use the telephone. Second, if a serious injury does occur, the teacher can call for help immediately.

Pupil safety should always be the uppermost concern in any specialized class. There must be constant and unremitting enforcement of the rule requiring pupils to wear safety goggles. Courts frequently weigh the educational benefits of certain activities against the dangers involved in pursuing them. They also expect the specialized classroom to contain safety equipment appropriate to its type of activity: water showers or baths in the chemistry laboratory; also fire extinguishers and first aid kits.

First aid for pupils who are injured is a touchy subject. Ideally, teachers of specialized classes would have certification in first aid. Even without certification, however, they should give routine and elementary first aid—in most circumstances. Most states have "Good Samaritan" laws that protect the person administering aid from liability. However, many of these laws protect the first aider only if he has had training in the use of first aid. In any event, a teacher should "do something" if an injury occurs. Even without medical training, there are some very basic first aid procedures that should be applied. Teachers need to remember not to act beyond the limited medical knowledge they may possess.

General Science Classes

As an essential part of the curriculum, most general science classes require pupils to perform some relatively safe and rather simple experiments. Most of the cases arising from injury sustained in general science classes appear to result from fire. The following four cases are illustrative:

Rixmann v. *Somerset Public Schools, St. Croix County* (266 N.W. 2d 326, 1978) is a recent case from Wisconsin that is quickly becoming a classic in contributory negligence. The case involves an accident that occurred in a high school general science class for sophomores. The pupils were conducting an experiment that necessitated heating alcohol over an electric burner. The science teacher warned that the substance was highly flammable and told the class to avoid subjecting it to open flames. Ronald Rixmann and two of his friends were conducting the experiment together. Apparently the pupils became bored and decided to ignite some of the alcohol. They took a small amount of it out of the beaker with a plastic spoon, poured it onto the table top, and lit the substance with a match provided by Rixmann. The flaming alcohol set fire to the plastic spoon. The boys put the spoon into a beaker of water but, in doing so, ignited the beaker of alcohol. The science teacher was across the room working with another group of pupils. He saw the fire and attempted to extinguish it by placing a notebook on top of the beaker. Unfortunately, he tipped the beaker over, spilling its flaming contents on Rixmann and causing severe burns.

Ronald's father sued the science teacher and the school division for negligence. The trial judge held the science teacher negligent automatically but allowed the jury to consider the negligence charge against the school district. The jury found the teacher 60% negligent and the school district 40% negligent, awarding damages of $656.33 for past medical expenses, $8,400 for future medical expenses, $25,000 for past pain, and $30,000 for future pain—$64,056.33 in all. The trial judge limited the amount to $25,000, and Rixmann's father appealed that decision.

The Wisconsin Supreme Court ruled on various legal technicalities involved in the trial but reversed the finding of the trial court on the issue of contributory negligence. The high court said:

> It may be true, as the trial court stated, that these students "weren't the brightest." But all three of the students were bright enough to know that alcohol was flammable and that they were not supposed to have open flames near it. On the basis of these admitted and undisputed facts, we conclude that the students, by collaborating to set fire to the puddle of alcohol on the table, did not conform their conduct to that which would be expected of a similarly situated child of the same age and with the same capacity, discretion, knowledge, and experience in creating the intial fire. The evidence does not reasonably admit an alternate conclusion. Thus, the trial court erred in not holding these students, Ronald included, negligent as a matter of law.[1]

The court found the evidence of contributory negligence so overwhelming that it said, "It does not shock the conscience of this court to hold the defendant students liable for their negligence; indeed, it would be shocking if the court were to relieve them of liability."[2]

Therefore, the science teacher and school district were absolved of all liability.

A similar case occurred in 1977 in Michigan. *Bush* v. *Oscada Area Schools* (250 N.W. 2d 759, 1977) concerns a physical science class that was moved by the school principal from the science lab to a mathematics classroom. Open flame, alcohol wick burners were being used for an experiment in the class. Wood alcohol was stored in a defective plastic jug kept in the back of the room. A 14-year-old female student sustained severe second and third degree burns when her burner ignited the wood alcohol, which was leaking from the plastic jug. The pupil's father sued the science teacher, the principal, the superintendent, and the school district. The Michigan Court of Appeals upheld the dismissal of suits against the superintendent and school district.

However, the court found the teacher and the principal negligent. Judge J. J. Peterson explains why the teacher should be held liable:

> As to the defendant teacher, she... is charged by the complaint with personal negligence in the conduct of her class, both in acts of omission and commission, including conducting the class under inadequate and unsafe conditions, allowing storage of alcohol in a damaged container, leaving spilled alcohol exposed to ignition sources, failure to properly handle and store the alcohol when open flame lamps were in use proximate thereto, and failure to warn and supervise the students in handling alcohol and flame. We think there is a fact issue for the jury as to the conclusion that may be drawn regarding her conduct.[3]

The principal should be held negligent for the following reasons, the court said:

> As to the defendant principal, we reach the same result, not because of the allegations of in-class negligence of the teacher, but because of the risks inherent in conducting a class of this kind in a room which is not equipped for the purpose. As principal of the high school, curriculum, scheduling, and room assignments would not only be within his knowledge but his direct responsibility. The removal of the class from the laboratory to the mathematics room was his responsibility. He must be presumed to know the nature of the class, that it would involve chemicals, fumes, alcohol, and open flame alcohol lamps, and that the room to which the class was transferred had no vents or any safety features of the laboratory. We cannot say that all reasonable men would agree that no negligence could be inferred under these circumstances.[4]

This is an interesting case from the viewpoint of school administrators, because it shows that principals can be held liable for injury if they schedule classes in improper or inappropriate facilities.

Station v. *Travelers Insurance Company* (292 So. 2d 289, 1974), a Louisiana case, was similar, with one important exception. The teacher was absent from the area when injury occurred. Geraldine Station, an eighth-grade pupil, was severely burned when an alcohol burner, known to be defective, exploded when Station attempted to relight it. The science teacher had helped Station and a friend set up a science project in the school gym. The teacher lit the burner and returned to his class. Apparently the burner went out. In relighting it, the two girls caused an explosion. The trial court awarded $7,889.95 in damages to Station. The science teacher appealed that finding.

The appeals court upheld the finding of the trial judge, stating: "The district judge... found that Wilson [the science teacher] was negligent in that he failed to fully instruct the girls, or anyone else who might assist them, of the dangerous nature of the alcohol and further [in] that he did not positively warn them that the burner was not to be re-lighted by them should it go out."

The court further found that "Wilson should have anticipated that the burner would go out, due to his prior experience with it, and that his failure to warn or provide adult supervision amounted to negligence under the circumstances, that negligence being the proximate cause of the minor's injuries."[5]

The court of appeals found Wilson's behavior blatantly negligent, given the extreme danger of the situation. A further quotation from the court's statement is warranted by the significance of the case:

> Here a dangerous instrument was placed in the hands of children without any special degree of care, supervision, or direction. Alcohol, a highly flammable substance, was left in their control to be used in connection with a *faulty* alcohol burner which had continually given trouble. That the situation was fraught with danger is proven by the results.
>
> The duty incumbent upon Wilson under these dangerous circumstances was to either positively warn these girls not to attempt to light the burner if it went out or to personally supervise their use of the equipment or provide adequate adult supervision in his absence. He did none of these things. He testified that he did not teach the children how to light the burner because they were not mature enough to do so, but that he had instructed them as to the flammable properties of alcohol. Nowhere in the

> record, however, is it established that Wilson directed these children not to attempt to light the burner should it go out. Neither was adequate adult supervision provided which was commensurate with the danger involved. We agree with the trial judge that this was negligence on the part of Wilson and that this negligence was the proximate cause of Geraldine Station's injuries.[6]

A recent and potentially very important pair of cases involves a junior high school science class and the publisher of a science laboratory textbook. It is the first case in which a textbook publisher has been ruled liable. *Carter* v. *Rand-McNally* and *Bertrand* v. *Rand-McNally* (#76-1864-F, U.S.D.C. Springfield, Massachusetts) involved an explosion in a junior high school science laboratory. The pupils sued the science teacher and the publishers of the textbook, *Interaction of Matter and Energy).* Apparently a flash-fire/explosion occurred as a result of the pupils' use of methyl alcohol in an experiment. The pupils' attorney argued that use of this chemical by junior high school pupils in limited science facilities was unsuitable and contributed to the pupils' injuries. The attorney's cross-examination of the author of the textbook may have been a key factor in the jury's award of almost a million dollars in damages to the pupils from both the teacher and the publishing company. The teacher's insurance company settled out of court for $670,000. Rand-McNally has not yet decided whether to appeal the decision awarding $155,000 to the two girls.

Another interesting science project case is *Simmons* v. *Beauregard Parish School Board* (315 So. 2d 833, 1975). This Louisiana case involves an injury to a pupil when a simulated volcano blew up. The injured pupil had demonstrated the volcano effect several times in class prior to the explosion, which occured as he was demonstrating the volcano to friends while waiting for a school bus. The jury found the science teacher (Jefferson Bryant) liable for exercising no control over the pupils' science projects and the school board liable for not providing adequate supervision at the school bus stop:

> Under the foregoing facts there was ample evidence for the jury to conclude that Mr. Bryant was negligent in allowing Lesley, a 13-year-old student, to build and demonstrate a project without even determining exactly what substances were used or whether the project was dangerous to the student himself or others. The lack of supervision on the part of this school board employee was negligence, resulting in serious injury to the child.[7]

The school district used contributory negligence as a defense, but the court held neither the 13-year-old pupil nor his father (who had helped him build the project) liable for such negligence.

Chemistry Classes

There are two classic educational tort cases involving injuries to pupils in high school chemistry classes. The most famous case was decided in 1935, but its principles are quite applicable today. *Mastrangelo* v. *West Side Union High School District of Merced County* (42 P. 2d, 634, 1935) involved massive injuries to Elge Mastrangelo, a junior high school pupil. When the injury occurred, he was in a chemistry lab conducting an experiment designated Number 40 in his chemistry laboratory book. The pupils were to make a crude type of gunpowder in very small quantities and explode it. Mastrangelo, in the company of two other pupils, had successfully performed the experiment twice. During a third attempt, one of the pupils, instead of pulverizing the ingredients on separate sheets of paper as directed by the textbook, put them all together in an iron mortar and began grinding them there. Departing again from textbook directions, the pupils either mistakenly or intentionally substituted potassium chlorate for potassium nitrate. While these ingredients were being ground together in the iron mortar, an explosion occurred. It severed Mastrangelo's left hand, severly injured his right hand, destroyed his right eye, and injured his left eye. The court summarized his injuries as "serious and permanent." Mastrangelo brought suit against the chemistry teacher for negligence; however, the trial court dismissed the suit without allowing a jury to decide the issues. The pupil appealed the case to the California Supreme Court.

In reviewing the evidence of the case, the high court found that there was substantial evidence to admit this question to a jury:

> It is not unreasonable to assume that it is the duty of a teacher of chemistry, in the exercise of ordinary care, to instruct students regarding the selection, mingling, and use of ingredients with which dangerous experiments are to be accomplished, rather than to merely hand them a textbook with general instructions to follow the text. This would seem to be particularly true when young and inexperienced students are expected to select from similar containers a proper, harmless substance rather than another dangerous one which is very similar in appearance.[8]

The California Supreme Court felt that the two primary concerns in this case were the issues of negligence by the teacher and contributory negligence by the pupils. The court preferred that these issues be decided by a jury. From the evidence presented, the court determined that the chemistry teacher was present in the laboratory during the experiment, that he stood immediately behind the pupils, and that he may have seen what ingredients they were mixing. The court also questioned the appropriateness of the particular experiment:

> It may well be doubted whether it is proper in an introductory school course in chemistry to require pupils to make and ignite an explosive. It would appear that the dangers of such an experiment, incorrectly performed by young children, might be anticipated; and that the benefits to be derived from its actual performance by each pupil are not so great as to justify the risk of serious injury to the child. But at the very least, if it is to be performed, it necessarily requires the strictest personal attention and supervision of the instructor. We have no sympathy with the defense that the book called for certain ingredients, and that "the idea of putting in some other ingredient was out of his mind."[9]

In a 1970 case the Oregon Court of Appeals ruled two high school pupils contributorily negligent for injuries they sustained when a pipe cannon they had built exploded.[10] The two 15-year-old pupils made the explosive charge of this cannon from some chemicals they acquired from the school chemistry teacher. The pupils had badgered the teacher for weeks to give them some powdered potassium chlorate. The teacher did reluctantly give them a small amount. Several days later the pupils were able to steal some crystalline potassium chlorate from the school's chemistry storeroom. The pupils sent for and received a pamphlet describing the procedure for making various kinds of explosive charges. They admitted reading the pamphlet and all the warnings it contained. They also showed the pamphlet to the chemistry teacher, who cautioned them against doing any of the experiments described in the pamphlet. Against this caution, the two boys decided to make a pipe bomb. They put the chemicals together and put it in the bottom of the pipe. They then attempted to light it. Apparently the match they were using kept blowing out, so the pupils decided to keep the wind from blowing the match out by covering the fuse hole with their hands. When the match finally did light, the cannon exploded, severely injuring the hands of both boys. They later admitted that they knew what they were doing was dangerous, yet continued the experiment. The court found this to be a clear case of contributory negligence. That is, the pupils knew better and were negligent of their own well-being.

The court ruled that any suit against the chemistry teacher was completely unfounded.

Obviously, chemistry and other science teachers must be especially careful in supervising pupils in the laboratory. They should consider the relative educational benefit of an experiment and weigh these benefits against the risks involved. Also, it appears that teachers should try out each experiment before letting the class do so, in order to insure against errors in the textbook. All chemicals should be clearly marked. All burners and other equipment should be in good working condition. Explosive materials and chemicals should be stored in a safe area. And experiment instructions should be given clearly *before* the experiment begins to insure that pupils understand what they are doing. Perhaps a pretest would be appropriate before allowing them to conduct the experiment.

Wood Shop

As most of us know, industrial shops are places of high risk. Using dangerous machines and working with a variety of tools has great potential for accidents. Thus the courts hold shop teachers to a high standard of care. The next four cases illustrate this point.

In 1977 the Minnesota Supreme Court ruled on *Scott* v. *Independent School District #709, Duluth* (256 N.W. 2d 485, 1977). Richard Scott was a seventh-grade pupil in a junior high industrial arts class. A drill bit he was using broke and a piece became embedded in his left eye. Scott was not wearing his safety glasses at the time of the accident. The court determined that each pupil had been assigned safety glasses at the beginning of the course and that each had been instructed to wear them. However, the court found that this rule had never been consistently enforced.

The trial court judge found the school district liable as a matter of law and allowed the jury to rule on the issues of contributory negligence and damages. The jury awarded a total of $63,100 in damages. However, it found Scott 10% contributorily negligent and the school division 90% negligent, thereby reducing the awarded damages to Scott from the school division to $57,100. The Minnesota Supreme Court upheld the findings of the trial judge and jury.

Another case where a large damage award was upheld is *Scott County School District #1* v. *Asher* (312 N.E. 2d 131, 1974). Harvey Asher, a 16-year-old high school pupil was taking a vocational shop class. He cut his hand with a 10-inch bench saw. The injury, even after nine operations, left him with a claw-like deformity, so that he could not pick up even small objects. The pupil had to give up his job and all high school and vocational training courses that required use of the hand.

A trial court awarded the pupil $95,000 in damages because of negligence by the school in maintaining and operating the saw. The school district appealed the trial court verdict to the Indiana Court of Appeals. The school district raised seven issues in the case, almost all technical issues regarding instructions to the jury, pretrial information, the use of a demonstration in the court, etc. One issue was particularly interesting. Apparently, the defense presented a demonstration in court to show that if a blade guard had been used on the saw the injury would not have occurred. The school argued that the demonstration should have been inadmissible, because the blade guard was not manufactured by the same company that made the saw. The appeals court affirmed the finding of the trial court and dismissed the district's complaint against the student. Thus the student won the case and was awarded $95,000 in damages. The court found against all of the allegations of the school district.

Another "blade guard" case now becoming quite well known is *Matteucci* v. *High School District #208* (281 N.E. 2d 383, 1972). Lawrence Matteucci, age 14, brought suit against the school district after he was injured while using a shop saw without the blade guard. The trial court ruled in favor of the pupil. The school district appealed the case to the Illinois Appellate Court.

The injury occurred when the pupil was using a circular bench saw operated by electric power. Apparently, he had finished cutting a piece of wood, and as he walked around the saw he slipped on some sawdust, then reached up and grabbed the saw in order to keep from falling. He was badly injured. The shop instructor testified that he gave very close supervision to students who were using the saw. The teacher testified that on the day in question he was working with other pupils in the classroom about 25 feet from the saw. The court found as follows:

> It must be conceded that the circumstances in this case placed a duty of due care upon the instructor. Safe use of this dangerous instrumentality certainly required due care from the instructor with reference to instruction of the students as to proper use of the machine and proper supervision to enforce necessary rules of safety.... We hold specifically that...where a high school class is obliged to use an admittedly dangerous machine, there is a duty upon the instructor, as agent of the school, to exercise care in instructing the students in safe and proper use of the machines and also a duty to exercise due care in proper supervision of students and use of machines as a part of regular school activities.[11]

In addressing the issue of proximate cause, the court quoted *Nay* v. *Yellow Cab Company* (117 N.E. 2d 78): "The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen as likely to occur as a result of negligence, although it is not essential that the person charged with the negligence should have foreseen the precise injury which resulted from his act."[12]

The Appellate Court of Illinois ruled in favor of the pupil, stating that "the jury was amply justified in finding that the accumulation of sawdust beneath a machine of this type was reasonably foreseeable so that it did not constitute an intervening cause of the plaintiff's injury [and] did not break the causal connection." The court summarily dismissed contributory negligence because the plaintiff was a 14-year-old minor.

South Ripley Community School Corporation v. *Peters* (396 N.E. 2d 144, 1979) is another recent "blade guard" case in which a pupil was awarded large damages. Fourteen-year-old Thomas Peters and a friend were cutting some wood on a 10-inch circular saw for their instructor to use as a demonstration in another class. The saw had a defective blade guard, and when Peters attempted to free the saw's blade from a piece of wood he cut off four of his fingers. At the time of the accident the shop teacher was in an adjacent room with a drafting class. Peters and his parents filed suit against the school division and the manufacturer of the saw. The trial court held only the school liable for $100,000 in total damages. The school district appealed that ruling to the Indiana Court of Appeals.

The higher court upheld the finding of the trial court as well as the damage award. The court agreed with the lower court's finding that there is a burden on the school to provide safe equipment for the pupils' use:

> We have high praise for the vocational training programs offered by the schools in this state. Such programs, however, frequently expose young persons to dangers which they otherwise would not encounter in the school setting. It is not unreasonable to require that, in the school setting, the dangers be minimized by means of guarded machinery and personal supervision. We repeat Justice DeBruler's statement: "It is not a harsh burden to require school authorities in some instances to anticipate and guard against conduct of children by which they may harm themselves or others. Neither is it unduly harsh to deny a school certain defenses if the trier of fact determines that the school has failed to fulfill its initial vital responsibility when danger of such magnitude is involved.[13]

Specialized Classes

Not every case has gone against shop teachers. A 1977 case from South Carolina is quickly becoming a classic in its justification of a teacher's defense. *Hammond* v. *Scott* (232 S.E. 2d 336, 1977) involved an injury to Robert Hammond, who was struck in the eye by a nail thrown at the trash barrel by another pupil in a shop class. When this accident occurred, the teacher was out of the classroom in an adjacent area working on another pupil's special project. The pupil who threw the nail had been admonished several times previously for throwing things toward the trash barrel. The injured pupil's parents brought suit against the teacher and the school district, alleging negligence based on four issues: 1) The teacher failed to provide proper supervision, 2) The teacher failed to discipline the pupils to prevent them from throwing objects in the classroom, 3) The teacher failed to remove the defendant, Anthony Scott, from the classroom when his behavior became dangerous to others, 4) The teacher failed to warn the pupils of the dangers of throwing objects in the classroom.

The Supreme Court of South Carolina, in examining this issue, found that "many jurisdictions are in general agreement that a teacher can be liable for injury to students under their supervision if an injury is caused by the teacher's negligence or failure to exercise reasonable care to protect the students." But the court also said:

> Counsel argues that the teacher was negligent because he was not in the classroom at the moment the incident occurred. We disagree. It is, of course, impossible for a teacher to personally supervise each student under his care every moment of the school day. This especially is true in a situation such as woodworking class, in which students are involved in numerous projects, either by themselves or in small groups. A teacher must necessarily rely, to some extent, on the responsibility and maturity of his students to conduct themselves in a proper and safe manner.[14]

Machine Shop

A substantial number of injuries to young people working in school machine shops result in tort cases. The following are typical:

A student brought charges of negligence against a community college instructor in North Carolina after the student had two fingers mashed by a metal shearer in a shop class. The student had used the metal cutter at least twice without incident during the first semester. On one occasion he had been told by a fellow pupil to be careful of his fingers because they were too close to the guard rail. The injury occurred when the student was attempting to shear a small piece of metal. Apparently he was using an additional block of wood or metal to hold this piece when putting it into the machine. His fingers slipped as he looked under the machine to locate the foot pedal. The injured student sued, claiming negligence on the part of the teacher. In reviewing the issue of negligence, the trial court found that "an employer has an obligation to warn an employee of known dangers. By analogy, it is appropriate to impose a similar burden upon a teacher so far as the duty to warn a student of known hazards is concerned, particularly with respect to danger which a student, because of inexperience, may not appreciate."[15]

The trial court found, however, that the injured student had been warned on two occasions by other students that the instructor discussed the hazards of the metal shearing machine in class. The court stated, "We hold, as a matter of law, that plaintiff was adequately warned, and the instructor was not otherwise negligent in his dealings with plaintiff."[16] Even if the instructor had been found negligent, the issue of contributory negligence was paramount, said the court. The student failed to insure his own safety. He knew better than to do what he was doing, and regardless of any negligence that might have occurred on the part of the teacher, the student was contributorily negligent of his own safety. Therefore, the court dismissed all charges against the teacher. When the case was appealed, the North Carolina Court of Appeals upheld the trial court ruling of contributory negligence.[17]

An older but well-known case from New York illustrates the duty of shop teachers to provide pupils with appropriate safety equipment, even when such equipment is actually wearing apparel. In *Edkins* v. *Board of Education of City of New York* (41 N.E. 2d 75, 1942), Eugene Edkins, a high school vocational pupil, was injured while operating a lathe. Apparently, his loose clothing became entangled in the lathe and pulled him toward it. As he reached for the stop button, the machine amputated his right thumb. The Court of Appeals of New York upheld a trial court finding of liability against the school district, saying: "It is clear from this record that the school authorities recognized the danger to the students if, in the operation of the machines, the student-operator wore loose clothing of any kind."[18]

The court stated that vocational pupils should be supplied with shop aprons by the school:

> It is the statutory duty of the Board to furnish such equipment as may be necessary for the proper and efficient management of its activities and interests.... We think that the word "equipment" in the statute includes not only books and pencils but protective clothing for child students similar to that necessarily furnished by employers to men performing the same machine shop operations in industry.[19]

Specialized Classes

In another machine shop case, a pupil was awarded $15,000 in damages because he was injured when a grinding wheel broke.[20] The court held the teacher negligent because: 1) There was no guard over the grinding wheel, 2) Pupils were given safety instructions only once a year, and 3) The teacher did not consistently enforce the shop's safety rules.

A Louisiana pupil was awarded over $33,000 by a jury in 1978 after he sustained serious injuries in an explosion in a school's metal shop. *Danos* v. *Foret* (354 So. 2d 667, 1978) concerns an injury to Glenn Danos while he was watching his instructor cut the top off a freon cylinder on a lathe. The state's unsuccessful defense was that Danos was contributorily negligent because he knew that Foret was conducting a dangerous operation but chose to stand near him anyway.

Other Specialty Classes

The following cases must be classified as miscellaneous. They are reported because they have set significant precedents or hold special interest. A recent Texas case involving injury to an agriculture student affords great protection to teachers in that state. The case is *Barr* v. *Bernhard* (562 S.W. 2d 844, 1978). Mark Bernhard kept his calf on school agriculture property after obtaining permission from the instructors. One Saturday he was grooming the calf when it struck a support post in the barn. The barn collapsed, causing injury to Bernhard. The trial court held the school division and employees to be immune from suits for acts done within the scope of their employment. That initial ruling was eventually upheld by the Texas Supreme Court which said:

> We hold Section 21.912(b) of the Texas Education Code to mean that a professional school employee is not personally liable for acts done within the scope of employment, and which involve the exercise of judgment or discretion, except in circumstances where disciplining a student, the employee uses excessive force or his negligence results in bodily injury to the student.[21]

The Texas court, then, held the school agriculture teachers immune from suit even if they had failed to inspect properly the facility or to provide proper supervision over agriculture activities.

This is an important case for teachers in Texas because it makes them immune from suit unless, as stated above, they use excessive force in disciplining students or cause bodily injury by negligence.

Note that the statute only applies to "professional employees."

An auto mechanics teacher was held not negligent in *Morris* v. *Ortiz* (437 P. 2d 652, 1968). While dismantling a car, James Morris, an auto shop pupil, was severely cut in the hands. The Arizona Supreme Court held that the auto shop teacher had acted as a reasonable and prudent person would:

> Assuming that Ortiz (the teacher) was watching when Morris lifted the automobile top in an effort to "bend it," we are still at a loss here, in such a simple fact situation, to imagine how the prevision of this school teacher, as a reasonable man, could have been such as to recognize the danger of harm.[22]

The court also determined what constitutes a "reasonable and prudent person":

> Negligence is, of course, the failure to act as a reasonable and prudent person would act in like circumstances.... The test of negligent conduct is what a reasonable, prudent person would or would not do under the circumstances...and the principle is too well established for quibbling that before liability may be imposed for an act (or the failure to act), the prevision of a reasonable person must be able to recognize danger of harm to the plaintiff or one in plaintiff's situation.[23]

Therefore, the Arizona high court ruled that the shop teacher was not negligent, since a prudent and reasonable person would not have been able to foresee the injury occurring.

Some cases are decided by out-of-court settlements and never reach the courts. A recent case in Richmond, Virginia, illustrates this process. Huguenot Academy is a private school located near Fort Pickett. Pupils routinely searched the fort's firing range for spent shell cases in order to transform them into ashtrays and lamps in the school shop. At the time the case arose, the fence protecting the firing range was apparently down in at least one place, providing pupils with easy access. Mark Horner, a pupil at Huguenot Academy, found a shell on Fort Pickett's firing range and brought it into the school shop. As he drilled into the shell, it exploded, killing one pupil and severely injuring four others.

The parents of the pupils filed suit against Fort Pickett for operating an attractive nuisance (because the fence was down) and Huguenot Academy (because the shop teacher gave permission for the pupils to work on the shells). The suits sought a total of $3.59 million in damages. The Associated Press reported on 6 March 1980 that the following out-of-court settlement was made:

> Attorneys in the case said the parents of 14-year-old Scott Goodman, the youth killed in the explosion, are to receive $78,300 as their portion of the proposed settlement.
>
> Other proposed settlements presented to Warner include:
>
> —$18,333 to Douglas H. Pickrell and his father for shrapnel wounds Pickrell suffered in the explosion.
>
> —$60,000 to Mark Horner and his parents. Horner lost two fingers on his left hand and a portion of his left arm.
>
> —$102,688 to Eston A. Pace and his parents. Pace suffered shrapnel wounds, including a perforated left eye, and required plastic surgery.
>
> —$120,871 to Cariton N. Elam, III, and his parents. Elam received head and body wounds from shrapnel and lost his left ring finger.[24]

Tort cases in education that involve extreme injuries to several pupils are likely to be settled out of court, because insurance companies are reluctant to face juries that have been made aware of extensive injuries and their long term effects on children. The trial court judge will frequently rule that the school (or its employees) are guilty of negligence as a matter of law (not jury-decided) and only allow the jury to decide damages.

Summary

Several conclusions can be drawn from cases presented in this chapter. Most important is the fact that teachers of specialized classes are more frequently subjected to lawsuits and are more likely to be held liable for pupil injury than the average classroom teacher. The prudent teacher of a specialized class should do the following to reduce his or her liability:

1. Maintain the equipment in his class.
2. Instruct the pupils in how to use the equipment properly.
3. Give the pupils an equipment test.
4. Make sure the pupils understood what is wrong with any incorrect answers given on an equipment test.
5. Demonstrate what to do (and not do do) when using the equipment.
6. Have each pupil demonstrate, individually, that they know how to use the equipment.
7. Check each pupil out on each piece of equipment each year.
8. Enforce the constant use of safety glasses where appropriate.
9. Require pupils to dress appropriately for the activity.
10. Make each pupil sign a safety list each year.
11. Balance the danger of the activity with the educational benefit of the activity.

12. Never have more than one "dangerous" activity going on at one time, and closely supervise the dangerous one.
13. If a piece of equipment is defective or unsafe, do not allow pupils to use it.
14. Try never to leave the classroom, shop, or laboratory while pupils are working with equipment or chemicals.
15. If possible, get an Emergency Medical Training (EMT) certificate.
16. Make your work area as safe as possible (installing fire extinguishers, water baths, etc.).
17. Stress safety above everything else.

While the above suggestions may seem overwhelming, most conscientious shop and science teachers observe them. Teachers need to be constantly aware of their responsibilities for pupil safety. They should also document their safety procedures.

Notes

1. *Rixmann* v. *Somerset Public Schools, St. Croix County* 266 N.W. 2d 326 (1978).
2. Ibid.
3. *Bush* v. *Oscada Area Schools* 250 N.W. 2d 759 (1977).
4. Ibid.
5. *Station* v. *Travelers Insurance Company* 292 So. 2d 289 (1974).
6. Ibid.
7. *Simmons* v. *Beauregard Parish School Board* 315 So. 2d 833 (1975).
8. *Mastrangelo* v. *West Side Union High School District of Merced County* 42 P. 2d 634, 2 Cal. 2d 540 (1935).
9. Ibid.
10. *Hutchison* v. *Toews* 476 P. 2d 811, 4 Or. App. 19 (1970).
11. *Matteucci* v. *High School District #208* 281 N.E. 2d 383 (1972).
12. Ibid.
13. *South Ripley Community School Corporation* v. *Peters* 396 N.E. 2d 144 (1979).
14. *Hammond* v. *Scott* 232 S.E. 2d 336 (1977).
15. *Kiser* v. *Snyder* 205 S.E. 2d 619, 21 N.C. App. 708 (1974).
16. Ibid.
17. Ibid.
18. *Edkins* v. *Board of Education of City of New York* 41 N.E. 2d 75 (1942).
19. Ibid.
20. *Severson* v. *City of Beloit* 167 N.W. 2d 258 (1969).
21. *Barr* v. *Bernhard* 562 S.W. 2d 844 (1978).
22. *Morris* v. *Ortiz* 437 P. 2d 652 (1968).
23. Ibid.
24. *Harrisonburg (Va.) Daily News Record*, (16 March 1980) section 1, p. 13.

V

Athletics

There is, without doubt, more tort litigation in the area of athletics than in all other educational areas combined. The last 10 years have produced literally thousands of athletic injury-related cases. In order to make the ensuing discussion more manageable, only a few cases will be examined from each area. The cases are divided basically into two groups: those involving physical education classes and those involving extracurricular sports activities.

As mentioned in Chapter I, many of the legal principles involved in vocational education also apply to athletics. Depending upon the activity, the three responsibilities of educators become very important: adequate supervision, proper instruction, and maintenance of equipment.

Adequate supervision in athletics depends a great deal upon the nature of the athletic activity. A senior high school softball game requires less supervision than trampoline activities or advanced gymnastics. The more opportunity there is for a pupil to be injured, the more constant and close the supervision must be.

Proper instruction is a particularly vital element in athletics. Often a case will hinge upon whether the teacher/coach can prove that he/she taught the pupil the proper athletic technique. Of course, documentation is the key in a court proceeding. Most good physical education teachers/coaches normally break down a complex athletic sequence into many small activities. The teacher should develop a checklist of these activities for each pupil and demonstrate how to do each one (and how not to do it). The date of this demonstration should appear on the checklist. Then each pupil should demonstrate to the teacher his or her ability to perform successfully the activity. Upon doing so, a check is placed beside the pupils' names in the column that describes the activity. Thus there will be actual documentation of proper instruction in how to tackle, how to swing a golf club, how to tumble, etc. Most physical education teachers/coaches go through this teaching process anyway, but many of them fail to develop the checklist that verifies it.

Maintenance of equipment is as significant in athletics as it is in the vocational area. All equipment should be inspected when used. The more use equipment gets, the more often it should be inspected. Under no circumstances should pupils be allowed to use defective or dangerously worn equipment. Recent court decisions have held coaches and athletic directors liable for injuries attributable, at least in part, to substandard equipment. Manufacturers have also been successfully sued for making unsafe athletic equipment. This is why many manufacturers have dropped second-line equipment from production.

Frequently questions arise about appropriate pupil dress for participation in athletics. Alternatives must be provided for pupils who object, for bona fide religious reasons, to certain types of required clothing. For example, members of some religious groups do not wish to wear gym shorts because their religion teaches that shorts are immodest. The pupils' First Amendment right to freedom of religion must not be violated.

However, where there is no religious opposition, a physical education teacher or coach can require appropriate dress for athletic activities based on safety reasons. Tennis shoes, gym shorts, and sweatshirts may be required as long as pupils can substitute some other appropriate article of clothing for the activity (cut-offs instead of gym shorts, for example). Most state courts will not uphold a requirement to wear school-sponsored gym suits. A reasonable and practical alternative must be provided. Physical education teachers may require gym clothes to be washed regularly.

Required showers constitute a troublesome issue. If shower stalls offer at least some degree of privacy, then requiring pupils to take showers after class is probably acceptable to most courts. But if the showers are communal in nature, a teacher probably cannot require pupils to take them after physical education classes.

Injuries in Physical Education Class

This section will deal with pupil injuries that occur in a physical education class setting. Once again, the issue of teacher absence becomes important in some cases. *Kersey* v. *Harbin* (531 S.W. 2d 76, 1975) involves an injury to a pupil while the physical education teacher was not present. Daniel Kersey died as a result of a fight that occurred in gym class. The pupil's junior high school teacher failed to appear for this class. The other physical education instructor took over its supervision, along with his own class. This produced a pupil/teacher ratio of approximately 45 to 1. While the second teacher was with his own class, Kersey became involved in a scuffle and was thrown to the floor. The school nurse, after inspecting him for injury, allowed Kersey to continue participation in the class. Later that afternoon he died as a result of injuries sustained in the fall.

Kersey's parents filed suit against the school division, the physical education teachers, and the school nurse. The Missouri Court of Appeals upheld the dismissal of all suits, stating that the parents failed to "state a claim on which relief could be granted."[1] The court also addressed the issue of the original physical education teacher's absence:

> There is no allegation that Daniel's assailant, if we may call him that, was one of the students who "had a history of causing disturbances"; no allegation that the conduct of the unruly group was such as was likely to cause actual harm to other students; no allegation that the "history of causing disturbances" was or should have been known to any particular defendant, and no allegation that the conduct of Daniel's fellow students could have been controlled by the exercise of reasonable care on the part of any of the defendants so as to avoid injury to the decedent.[2]

Therefore, the court upheld the dismissal of the suits. However, it is interesting to note that if Kersey's assailant had had a previous history of violent behavior, the physical education instructor could have been found liable.

Gymnastics. As mentioned in Chapter II, a famous case—actually a pair of cases—was decided by the Illinois Supreme Court in 1976. ***Kobylanski*** v. ***Chicago Board of Education***, along with ***Chilton*** v. ***Cook County School District #207*** (347 N.E. 2d 705, 1976), established legal precedent in the state.

The cases are consolidated to present an issue in tort liability. The first, the ***Kobylanski*** case, came out of Chicago, where Barbara Kobylanski was a 13-year-old pupil at the time of the precipitating accident. She suffered spinal injuries when she fell while attempting to perform a knee-hang on steel rings suspended from the ceiling of the school gymnasium. Kobylanski's complaint primarily consisted of the fact that the physical education teacher failed to provide proper instruction and supervision at the time of the accident. The trial court found "that Kobylanski had failed to prove that the defendants were guilty of willful and wanton misconduct."[3]

The ***Chilton*** case also came out of Chicago and the issue is similar. Linda Walton, a physical education instructor, was sued by a 15-year-old freshman high school pupil who suffered spinal injuries on a trampoline maneuver in physical education class. The pupil sued the school district because it allegedly failed to provide proper supervision and the physical education teacher because she allegedly failed to supervise the class properly. The jury at the trial court returned a verdict in favor of Chilton against only the school district but not against the teacher.

These cases came before the Illinois Supreme Court to settle one primary issue. The Illinois code, Sections 24-24 and 34-84a, creates in essence an *in loco parentis* status for educators. Indeed, the Illinois Supreme Court stated:

> These statutes confer upon educators the status of parent or guardian to the student. None of the parties to these appeals disputes the fact that a parent is not liable for injuries to his child, absent willful and wanton misconduct.[4]

Both pupils, Kobylanski and Chilton, contended that the statute providing proof of "willful and wanton misconduct" applied only in matters of discipline and not in matters of supervision. The court said:

> Reviewing the language of the statutes, we find that they were intended to confer the status *in loco parentis*, in nondisciplinary as well as disciplinary matters.... The statute further indicates that this relationship applies to all activities in the school program. Since physical education is a required part of the academic curriculum, classes in which Kobylanski and Chilton were injured are clearly activities connected with the school program.... Sections 24-24 and 34-84a confer upon teachers and other certified educational employees immunity from suits of negligence arising out of matters relating to the discipline in and the conduct of the schools and the school children. In order to impose liability against such educators, the plaintiffs must prove willful and wanton misconduct.[5]

Therefore, the Illinois Supreme Court reversed the decision of the *Chilton* case, providing no damages whatsoever to the pupil, and affirmed the decision in the *Kobylanski* case, upholding the fact that no damages were awarded.

As stated in Chapter II, these cases provide great protection for educators in Illinois. Before an educator can be found guilty of negligence, the educator must commit some act of which even the parents could be found guilty.

The *Kobylanski* decision was cited by the Illinois Supreme Court in a similar case brought before it in 1976. In *Winesteen* v. *Evingstone Township Community School District #65* (351 N.E. 2d 236, 1976) a pupil sued the school district and the physical education instructor for damages because of an injury that occurred while he was exercising on the parallel bars in class. The pupil fell from the bars to the floor and sustained serious and permanent injuries, allegedly caused by the physical education teacher's negligence. The trial court dismissed all of the complaints, particularly the complaint that the teacher was negligent. The court held that teachers standing *in loco parentis* should not be subject to any greater liability than that of parents for their children. The Illinois Supreme Court heard the appeal and affirmed all of the trial court's decisions, thus dismissing the suits against the teacher.

However, a 1978 case heard by the Illinois Court of Appeals held a physical education teacher liable for heavy damages in spite of the *Kobylanski* precedent. *Landers* v. *School District #203, O'Fallon* (283 N.E. 2d 645, 1978) concerned an injury to a high school student in physical education class during a tumbling exercise. The trial court awarded Michelle Valentine, now Michelle Valentine Landers, $77,000 in damages because the physical education instructor had been found guilty of "willful and wanton misconduct." Landers was greatly overweight at the time of the accident. The class was to do backward somersaults, which required pupils to lean back on their necks and flip themselves backward onto their feet. Landers felt that she could not do this, and went to the instructor to express her fears regarding the exercise. The instructor said that she would help her after school. However, Landers said she took a school bus home because she was unable to stay after school for individual help. The next day the instructor asked Landers to do the backward somersault. The pupil reminded her of the previous day's conversation. The instructor said that Landers had to do the exercise anyway and that a couple of students could support her in performing it. As Landers was doing the exercise she felt her neck snap. Severe neck injury was diagnosed at the hospital shortly thereafter. Because intensive surgery was required, medical damages claimed in this case were large.

The entire case hinged on whether the teacher was guilty of "willful and wanton misconduct" when she ignored Lander's request not to do the backward somersault. The trial court allowed this issue to go to a jury. The jury ruled that the teacher was guilty of negligence and awarded the $77,000 in damages. The case was appealed to the Illinois Appellate Court.

Quoting the *Kobylanski* decision, the court noted that "teachers thus are not subjected to any greater liability than parents who are liable to children for willful and wanton misconduct, but not for mere negligence."[6] The court said: "We must examine the facts of the present case to determine whether the jury's finding that the school district was guilty through McElroy [the teacher] of willful and wanton misconduct in the supervision of Michelle's gym activities is against the manifest weight of the evidence."[7] The court said the record showed that the physical education instructor was well aware that Landers was overweight, that she was untrained in the somersault activity, and that she had fears about doing it; also, the physical education instructor admitted at the trial that she knew prior to the accident that if a person did not have sufficient arm strength to support the weight of the body, the weight could fall on the person's neck. Therefore, the court found:

> The school district's instructor chose to ignore the obvious dangers created by Michelle's fear, inexperience, and excessive weight, and to rely upon the brief demonstration of a backward somersault made by another student at the beginning of the gymnastics program to prepare her for the safe performance of this activity. A finding of willful and wanton misconduct based on these facts is not against the manifest weight of the evidence.[8]

The appeals court therefore upheld the damages award against the school district because of the negligence of the physical education instructor.

A 1973 case from Oregon offers an interesting view of contributory negligence as a defense.[9] Twelve-year-old Carol Grant was learning to use the springboard in a physical education class. She had used the board correctly approximately 20 times in one session. Toward the end of class, Carol's physical education teacher instructed her and some other pupils to put the springboard away. The pupils dragged the board into an alcove that had a low ceiling. Carol attempted to use the springboard to propel herself out into the exercise room. She hit her head on the ceiling beam, sustaining injury. The jury awarded Carol $10,500 in damages. However, the trial judge denied the jury award, ruling that Carol was contributorily negligent as a matter of law. The pupil appealed the judge's decision to the Oregon Court of Appeals. The appellate court held that contributory negligence would be a satisfactory defense only if the pupil knew she was engaging in a dangerous act:

> In the case at bar there is no testimony to the effect that plaintiff knowingly embarked on a course of dangerous conduct. Her contributory negligence, if any, was in her failure to perceive the source of her danger. She knew the beam was there but jumped anyway, thinking she would miss it. If she would have known this was dangerous and did it anyway, then she would be guilty of negligence.[10]

The court concluded that Carol should receive the $10,500 damage award because the teacher was not providing proper supervision. The court statement continued:

> However, the facts of this case indicate that it can reasonably be found that proper supervision could have prevented this accident if the teacher would have noticed that the springboard was not being stored properly before plaintiff jumped off and struck her head on the beam. A quick admonition could have prevented her injury.[11]

A recent Minnesota case demonstrates the liability of a school principal for not properly supervising the school's curriculum. In *Larson* v. *Peterson* (252 N.W. 2d 128, 1977; 289 N.W. 2d 112 [1979] rehearing denied January 28, 1980), eighth-grader Steven Larson suffered permanent quadriplegic paralysis while attempting to do a headspring over a rolled mat. The exercise was a requirement in his physical education class which was being taught by a novice teacher. The pupil sued the teacher for negligence in requiring too difficult an exercise for eighth-graders, the principal for failing to properly supervise the school's physical education program, and the school district's superintendent for failing to implement and supervise the school district's physical education curriculum.

The trial court judge dismissed the charges against the superintendent finding that no "prima facie" evidence of negligence existed. However, the jury found both the teacher and the principal negligent and awarded $1,013,639.75 in damages to Steven and $142,937.89 in damages to Steven's father. The trial court judge, noting that the school division possessed $50,000 in liability insurance, held the school liable for that amount to both defendants.

Larson appealed the dismissal of charges against the superintendent to the Minnesota Supreme Court. That court held that the dismissal of charges was proper but held the school district immune from liability of the two negligent defendants. The court also found that there was ample evidence to hold both the teacher and the principal liable for negligence in the amounts awarded by the jury.

In holding the principal liable, the court noted that the principal is charged with implementing the school's curriculum, yet failed to do so in the case of the physical education curriculum. This failure to take an active role in implementing and supervising the physical education curriculum causes the principal to be guilty of comparative negligence.

> In effect, the jury found that Peterson's (the principal's) actions as an administrator were unreasonable and that his failure to reasonably administer the curriculum and supervise the teaching of an inexperienced instructor created the opportunity for Steven's accident to occur. A review of the record demonstrates that the jury could make such a finding. [This court will not disturb findings of fact by a jury unless they are manifestly and palpably contrary to the evidence as a whole.][12]

Therefore, the Minnesota Supreme Court upheld the findings of negligence against the physical education teacher and the school's principal.

Baird v. *Hosmer* (347 N.E. 2d 533, 1976) appears to be a major case in the teacher liability area. It was decided by the Ohio Supreme Court in 1976. A high school pupil, Jandi Baird, was injured in a gym class when her physical education teacher instructed her to perform a series of exercises that involved jumping back and forth over a wooden bench. The pupil struck her knee on a sharp corner of the bench and fell to the floor with great force. Knee surgery was required. Baird also "suffered great pain of the body and mind" and has a permanent scar and disfigurement of the knee.

The pupil's parents sued the teacher for negligence. The trial court dismissed the complaint, holding that teachers are protected under the sovereign immunity statute of Ohio. The Ohio Supreme Court reversed that decision. The primary issue in this case does not appear to be the negligence of the teacher, but rather whether the teacher is protected under the state's sovereign immunity statute. The Ohio high court, in addressing this issue, found:

> We do not agree with the contention of this defendant that the immunity of the school board from liability to the plaintiff extends to him.... The fact that Albrite [the physical education instructor] was performing a governmental function for his employer, the school board, does not mean that he was exempt from liability for his own negligence in the performance of such duties.[13]

The Ohio Supreme Court ruling directly contradicts the Illinois Supreme Court's decision in *Kobylanski*. The Ohio court felt that teachers should be held to a higher standard of care than parents in spite of the *in loco parentis* doctrine:

> ...[A]lthough we agree that a teacher has the obligation of maintaining supervision and discipline within the areas of his responsibility, it does not follow that the considerations of public

> policy...would be served by granting teachers the immunity therein accorded to parents... Clearly, the parent-child relationship is unique, and the effect upon classroom environment of a student's suit against the teacher is minimal when compared to the disruptive influence on the home that would result from a court action by a child against a parent.[14]

Therefore, the court ruled for the pupil against the teacher, holding that teachers are not protected under the state's sovereign immunity statute and are liable in an action brought by a student.

In two other physical education class cases involving gymnastics, the teachers were held not negligent by the courts. *Lueck* v. *City of Janesville* (204 N.W. 2d 6, 1973) involved an injury to a senior high school pupil who fell from the rings after failing to perform a forward roll. The physical education teacher used an admittedly loosely supervised teaching style with this elective gymnastics course. The trial court granted the teacher's motion for a summary judgment, and the pupil appealed the case to the Wisconsin Supreme Court. The high court held that even though the teacher's (Sorenson's) supervision was general, it was still adequate:

> This is the whole point—Mr. Sorenson's supervision of the class that day was "adequate." It would be impossible to watch every student all of the time during the class period. DeCarlo *[the student]* never said Sorenson did not comply with the standards that a reasonable and prudent teacher would follow in teaching gymnastics. In fact, the word "adequate" would allow only one reasonable inference. That is, Sorenson did comply with the required standard of care. Whether DeCarlo would have personally handled it "more wisely" is not the test. What DeCarlo would do and what the standard of care requires are two different things. The standard is what determines one's negligence and not what others may have personally done.[15]

Therefore, the Wisconsin high court upheld the dismissal of the suit against the physical education instructor.

Kevin Banks, a 15-year-old, suffered a "very slight subluxation of the cervical spine (at C-2 and C-3)" when he took part in an unauthorized tumbling activity in ***Banks*** v. ***Terrebonne Parish School Board*** (339 So. 2d 1295, 1976). When Banks arrived for physical education class, he noticed some classmates using the springboard to propel themselves across some chairs onto a tumbling mat. When Kevin attempted the activity, he landed on his head, sustaining the injury. At the time, the physical education teacher was at the other end of the gym supervising other pupils.

The teacher testified that he would not have allowed the tumbling exercise to continue had he known about it. The trial court dismissed the pupil's suit against the physical education teacher and the school division. Banks appealed that decision to the Louisiana Court of Appeals. The court upheld the dismissal by the trial court, stating:

> The evidence establishes that the coach was not aware of the unauthorized activity going on because he was busy collecting valuables from other students and with other matters preliminary to getting a physical education class started. There is just no way that a teacher can give personal attention to every student all of the time.[16]

Descal v. *Delphi Community School Corporation* (290 N.E. 2d 769, 1973) concerned an injury to a girl who, when running from her gym class to the locker room, fell and broke an ankle and an arm. The injury required her to be in the hospital for a considerable length of time. The parents brought suit against the gym teacher and the school district, making three allegations. First, there were too many girls in the gym class (45, to be exact). Second, the school was failing to provide adequate shower facilities for such a class. Only six showers were available. And third, the school and the physical education teacher failed to provide sufficient time for 45 girls to shower in six shower stalls. Consequently, the girls had to run to the locker room in order to shower and be in class on time. While the Indiana Court of Appeals did question the wisdom of having so many students in a physical education class with such limited facilities, the court upheld the trial court in dismissing all of the charges.

Trampoline. Of all the equipment used in physical education classes, the trampoline may be the most dangerous. Some states have even forbidden the use of trampolines in public schools in an attempt to minimize the risk of injury to pupils. However, as the two following cases illustrate, a knowledgeable physical education teacher who uses prudence and reasonable judgment will be protected by the courts from liability suits.

Berg v. *Merricks* (318 A. 2d 220, 1974) demonstrates very well the distance a court will go to protect an educator. Michael Berg was a senior in high school when he fractured his neck in a trampoline accident. His injury resulted in paraplegia. Apparently, Berg was attempting a "back pull over" (as required by the teacher) on the trampoline. However, testimony indicates that Berg skipped the preliminary warm-up exercises before attempting the activity.

Berg and his mother filed suit against the teacher, the principal, the superintendent, and the school board. Eventually, the trial judge dismissed all suits against the educators. Berg appealed that decision. The Maryland Court of Special Appeals upheld the trial court's dismissal of the suits, stating that such an accident could not be anticipated:

> The nature of physical education activities comprehends physical hazards. The instructor must avoid as many of these hazards as he is humanly able considering the limitations under which he instructs, but the system cannot be made childproof. That such danger could reasonably have been anticipated and avoided in this setting is what the standard appellants have failed to provide.[17]

The Maryland court also felt that one of the duties of the judiciary is to protect prudent educators so that they will be free to educate: "The courts are just as much a shield to a teacher who has acted prudently as they are a weapon against him if he has neglected his duty."[18]

Another trampoline case where the physical education instructor was found not negligent is *Chapman* v. *State of Washington* (492 P. 2d 607, 1972). This case concerned an injury to a freshman university student, David Chapman, who was practicing on the trampoline after gym class. One other student was spotting for Chapman. While "attempting to perform a double-forward somersault, he lost his balance and fell off the trampoline onto the floor, landing on his head and shoulders. He sustained very serious permanent injuries."[19] The coach was 30 to 40 feet away supervising another student on the parallel bars. Chapman sued, alleging that the coach did not have enough spotters around the trampoline and that the coach was not providing a level of supervision commensurate with the activity. The jury found in favor of the coach. Chapman appealed the case to the Washington (State) Court of Appeals, which upheld the jury's original verdict of not negligent.

Although educators were found not negligent in the two cases discussed, they have been judged liable in many other trampoline cases. A trampoline is an inherently dangerous piece of equipment and should be used only with great care and intense supervision.

Wrestling. An interesting case concerning wrestling came out of Louisiana in 1978; it was ultimately decided in 1979. *Green* v. *Orleans Parish School Board* (365 So. 2d 834, 1978) dealt with an injury to a 16-year-old high school pupil "who was permanently paralyzed by injuries sustained while performing a wrestling drill in a required physical education class."[20] The pupil was injured in a "30-second drill" where pupils are allowed to use all the resources at their disposal. At the trial the main issue seemed to be whether or not the coach had given the pupils enough wrestling instruction to sustain a 30-second drill. Expert witnesses testified for both sides. The trial court held that there was not enough evidence to support a finding of negligence by the wrestling teacher. The injured pupil appealed to the Louisiana Court of Appeals.

That court, in examining the issues, found a higher duty of conduct (standard of care) incumbent upon physical education instructors. That higher duty requires more intense and specialized supervision.

> A teacher has the duty to conduct his classes so as not to expose his students to an unreasonable risk of injury. Certain classes, such as science, physical education, and vocational training, involve dangerous activities, and due care must be exercised in instructing, preparing, and supervising students in these activities so as to minimize the risk of injury.
>
> Furthermore, potentially dangerous activities require supervision reasonably calculated to prevent injury. The reasonableness of supervision is determined largely by the same factors used to determine reasonableness of instruction and preparation.[21]

However, the Louisiana court upheld the finding of the trial judge, because of the diverse testimony of the many expert witnesses.

Softball. Cases arise even in an activity as seemingly safe as scholastic softball. The two cases described here demonstrate how easily educators can be sued in an athletic activity apparently devoid of danger.

A case from Louisiana concerns the condition of the playing field and its effect on a pupil injury.[22] David Ardoin, a high school pupil, was injured when he tripped over a piece of concrete, a foot square and eight inches thick, located directly between second and third base. Ardoin injured his right knee in the fall. The pupil sued the school board, claiming that the board knowingly allowed a dangerous and hazardous condition to exist on the playing field. The trial judge held the school board liable and ordered payment of $12,000 in general damages and $1,895.60 for medical expenses. The school board appealed the decision to the Louisiana Court of Appeals. That court upheld the trial judge's findings, noting that:

> The law is settled that a school board is liable if it has actual knowledge or constructive knowledge of a condition unreasonably hazardous to the children under its supervision.
>
> We believe that a reasonable examination of the area assigned for use as a softball diamond would have revealed this hazard. It is not a case wherein a child was injured by wandering to the perimeter of the playground or school yard. This suit involves an injury at the *specific* play area in the base path of a softball field. Accordingly, we hold that the school authorities had constructive knowledge of this dangerous condition. They should have anticipated and discovered the potential danger and eliminated the harm.[23]

In another softball case, teachers were found not guilty of negligence when a 14-year-old, eighth-grade female pupil was severely injured when the batter allowed the softball bat to slip free and hit the pupil in the face.[24] The injured pupil, Pamela Brackman, was playing the position of catcher. Apparently, she was too close to the batter at the time of the accident. The pupil sued for $15,000 alleging that if a teacher had been in closer supervision the accident would not have happened. The trial judge dismissed the suit and the pupil appealed to the Tennessee Court of Appeals. That court upheld the dismissal, stating that if the teacher were only a few feet away she could not have prevented the injury.

> Thus, if the teacher had been standing only a few feet away from the plaintiff at the time and had been watching every move she made, we cannot assert that the teacher would have been under the duty of moving the plaintiff to another position. In order to conclude that she should, we must speculate as to how far behind the batter plaintiff was at the time, since we have no direct evidence on this point. All of this is to say that we are forced to the conclusion that the evidence does not support a finding of actionable negligence on the part of the teacher or teachers of the school who were in a supervisory capacity on the field at the time of plaintiff's injury.[25]

Therefore, the case was decided on the foreseeability aspect of the teacher's supervision.

Swimming. Swimming pools are very hazardous. In even the most strictly supervised settings, the possibility of a fatal accident exists. While most of the cases involving pools are decided on the issue of supervision, a case from Indiana addresses the issue of contributory negligence.

Stevens v. *Shelbyville Central Schools* (318 N.E. 2d 590, 1974) concerns the death of a pupil, Anthony Stevens, during swimming class. The swimming instructor found Stevens under water at the shallow end of the pool, pulled him out, and immediately administered artificial respiration, but to no avail. The pupil died. At the subsequent trial, the case was dismissed on two primary issues. First, three classmates gave testimony that Stevens was involved in an underwater breath-holding contest unknown to and unsanctioned by the swimming instructor. Second, earlier in the year the pupil had lost consciousness during a rope-climbing exercise and had fallen to the floor. The incident was known to both the pupil and his parents but was not reported to the instructor of the swimming class. The two issues involved are: 1) the incurred risks arising from not informing the swimming instructor about the rope-climbing accident and its potential effect on the pupil's safety in the water, and 2) contributory negligence arising from the possibility of a breath-holding contest. Regarding the incurred risk, the court quotes a 1965 Indiana case, *Stalings* v. *Dick*:

> The doctrine of the incurred risk is based on the proposition that one incurs all the ordinary and usual risk of an act upon which he voluntarily enters so long as those risks are known and understood by him or could be reasonably discernible by a reasonable and prudent person, under like or similar circumstances.[26]

The jury at the trial court found that, since no one attempted to notify the swimming instructor of the previous accident involving rope-climbing, the pupil incurred the risk involved in the swimming activity.

The second issue was the possibility of the breath-holding contest. The jury concluded that this constituted contributory negligence on the part of the pupil. Therefore, the jury ruled in favor of the school system and the teacher. The case was appealed to the Indiana Court of Appeals. That court affirmed the decision of the trial court and the jury, thus dismissing the suit against the school district and the swimming instructor.

Golf. A physical education case dealing with the sport of golf was recently decided by the Nebraska Supreme Court. ***Brabatcek*** v. ***Millard School District, School District #17*** (273 N.W. 2d 680, 202 Neb. 86, 1979) involved the death of a 14-year-old high school pupil after he was "accidentally struck in the left occipital region of his skull by a golf club during physical education class."[27] The trial judge held the school district liable as a matter of law and awarded $3,570.06 in special damages and $50,000 in general damages. Needless to say, the school district appealed that decision to the Nebraska Supreme Court. The court found negligent supervision on the part of the student teacher (the regular teacher was not in school that day) to be the proximate cause of the pupil's injuries and subsequent death. The court said:

> There is no question...that, at the very best, there was ineffective observation and attention on the part of the student teacher when ordinary care or supervision would have prevented the occurrence which resulted in the death of David.
>
> In this instance, working with ninth-graders, who were not familiar with the rules of golf, and in the case of the deceased, who had never before been exposed to the game, includes a duty to anticipate danger that is reasonably foreseeable.
>
> We have no difficulty in finding that the lack of supervision was a proximate cause of the death of David. "Proximate cause" as used in the law of negligence is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred.[28]

Therefore, the Nebraska Supreme Court upheld the trial court's finding of negligence and the awarding of over $53,000 in damages.

There are numerous other cases involving physical education classes in such sports as hockey,[29] tennis,[30] rugby,[31] and track.[32] However, the basic legal principles exhibited in those cases have already been discussed. Educators who work in the athletic area are very likely to be sued for negligence. As long as adequate supervision (which, in many instances, needs to be more than "general" supervision) is provided by the teachers, most courts will not hold them liable. However, educators should be aware of how many pupils they can truly supervise at once, the type of physical activity being pursued, and the limitations of the physical facilities in order to determine the level of supervision.

Extracurricular Athletics

Another important area in physical education tort law is extracurricular athletics. In many cases the legal principles are the same as for cases involving physical education classes. However, another factor must be taken into account. The fact that pupils enter into extracurricular athletics voluntarily makes a difference. The "assumption of risk" defense to negligence charges becomes much more important.

As with physical education classes, extracurricular athletics involve a number of different sports. Sometimes it is not the pupil who is injured in such situations. Occasionally a parent or a visitor will be hurt while attending an extracurricular activity as a spectator.

Football. Of all extracurricular activities, football seems to produce the most litigation. The high number of injuries—and occasional death—in high school football undoubtedly contribute to the volume of litigation. The case of *Sims* v. *Etowah County Board of Education* (337 So. 2d 1310, 1976) is one of those involving injury to spectators. Judy Sims was hurt when the viewing stand collapsed during a high school football game. Sims sued the school board, alleging that it had a duty to provide a safe and proper place to view the game. The trial judge dismissed the suit, resting the dismissal on the principle of school board immunity.

However, the Alabama Supreme Court reversed that finding. The high court felt that, under Alabama law, the purchase of a ticket was a contractual agreement between two parties. The court held that school boards have the legal status to enter into contracts and did so when it sold Sims a ticket to the game. One of the promises made by the proprietor of a contract of this type is a safe place to view the activity. The promise may be explicit at times, but is always implicit with the purchase of a ticket. The court said:

> For what we have here is a unilateral contract, with the promisor board of education, as proprietor, upon receiving the admission price, promising admission by ticket and the performance of all other contractual duties arising from the circumstances, including the implied promise that the premises are reasonably safe for the purpose of viewing the athletic contest.[35]

Therefore, the Alabama court reversed the decision of the trial court and held the school system liable for injuries sustained when the viewing stands collapsed.

Mogabgap v. *Orleans Parish School Board* (239 So. 2d 456, 1970) is a relatively well-known case involving the death of a high school football player during practice. Robert Mogabgap was participating in the second day of football practice when he became suddenly ill. The two football coaches had team members carry Robert onto the bus and eventually returned the boy to the high school. Simple yet ineffective and incorrect first aid was administered. The pupil died shortly afterwards of heat stroke. The parents of the deceased pupil filed suit against the two coaches for failure to recognize and properly treat heat stroke, as well as for delaying proper treatment, which might have saved the pupil's life. The parents also sued the principal, the superintendent, and the school board. The Louisiana trial court dismissed the suits against all of the educators. The pupil's parents appealed the decision to the Louisiana Court of Appeals. That court upheld the summary judgment in favor of the principal, superintendent, and school board, finding them not negligent.

However, the appeals court reversed the trial judge's dismissal of the suits against the coaches, finding them negligent because 1) they failed to get immediate help for the pupil and 2) administered improper first aid, applying a blanket to a person already suffering from heat stroke. The court said:

> Certainly it is plain that Robert E. O'Neil and Sam A. Mondello [the coaches] were negligent in denying the boy medical assistance and in applying an ill-chosen first aid.
>
> Here, the negligence of Coaches O'Neil and Mondello actively denied Robert access to treatment for some two hours after symptoms appeared. When he did see a physician, it was too late and he died. This much the plaintiff proved.[34]

The Louisiana Court of Appeals also awarded the parents of the deceased pupil $20,000 each for the wrongful death of their child, as well as $1,634.75 in compensatory damages, saying:

> The parents, of course, would not have traded nor could one have purchased the love and companionship of this exceptional and promising child for any amount of money. However, it is the task of this court to arrive at a figure for damages because of the wrong done these parents by the defendants' negligence. It is our opinion that an award of $20,000 to each parent for the wrongful death of their son is a just amount. Additionally, the father is entitled to an award of $941.25 for funeral expenses and $693.50 for medical expenses.[35]

Lovitt v. *Concord School District* (228 N.W. 2d 479, 58 Mich. App. 593, 1975) is another football case involving heat prostration. In this case, one high school pupil died and another was seriously and permanently injured after they were overcome by heat prostration during summer camp practice. As with previous cases of this type, the parents of the pupils filed suits against the coaches, principal, superintendent, and school board.

The trial court consolidated all the suits and then dismissed them. The parents appealed the decision to the Michigan Court of Appeals. One of the issues in the case was whether the football program was a governmental or a proprietary function. A governmental function is one that is directly related to the educational program. A proprietary function is one that makes money and/or provides some function that could be done by private industry. In some states school districts are liable for proprietary functions but not for governmental functions.

The Michigan court held that, since the football program had lost money for five years, it was not a proprietary function, thus holding the school district immune from suit. The superintendent and principal were found to be immune from suit as well.

However, the court took a very different view of the coaches' liability. The court held the coaches liable for violating a standard of care involved in a personal relationship as opposed to a governmental one, saying:

> In the present case, the plaintiffs' allegations are of active, personal negligence on the part of the teachers. The liability of the teachers is not based upon negligence imputed to them as public functionaries, but rather it arises from their individual conduct. They must be held accountable for their own actions.
>
> The teachers acted personally against single individuals; they violated a private duty to avoid negligently injuring these particular students. They abused a direct relationship, not merely a public responsibility to the citizens of the state in general.[36]

Therefore, the court held the coaches liable while upholding the immunity status of the school district, the superintendent, and the principal.

In 1978 a famous football case was decided by the Illinois Supreme Court. *Gerrity* v. *Beatty* (373 N.E. 2d 1323, 1978) involves 15-year-old Matthew Gerrity, who suffered a severe injury while making a tackle during a junior varsity football game. He filed a multi-count suit against the manufacturer of the football helmet, his attending physician, the hospital in which he received treatment, the city of Downers Grove (whose fire department personnel transported him to the hospital), and the defendant's school district. The trial court found no negligence in any of the individuals and also dismissed Count VI of his original complaint, on which the appeal was based. Count VI alleges that the school district was negligent in providing Matthew with an ill-fitting helmet. The trial court found, using *Kobylanski* as precedent, that Matthew must prove "willful and wanton misconduct" on the part of the school personnel before he could recover damages for negligence.

Count VI of the pupil's appeal alleged first that the school district carelessly and negligently permitted and allowed the plaintiff to wear an inadequate and ill-fitting football helmet. Second, the school district refused to furnish adequate and proper football equipment to the pupil upon his request. And third, the school district furnished and provided the pupil with an ill-fitting and inadequate football helmet when it knew, or in the exercise of ordinary care should have known, that the helmet was liable and likely to cause the pupil injury.

The Illinois Supreme Court, in reviewing the *Kobylanski* case, found that this case presented some very different issues. In fact, the court stated:

> On the contrary, the public policy considerations argue rather strongly against any interpretation which would relax a school district's obligation to insure that equipment provided for students in connection with activities of this type is fit for the purpose. To hold school districts to the duty of ordinary care in such matters would not be unduly burdensome, nor does it appear to us to be inconsistent with the intendent purposes of Sections 24-24 and 34-84A of the School Code. We, therefore, conclude that *Kobylanski* is not controlling here and that the factual allegations of Count VI fall outside of the scope of Section 34-84A of the School Code.[37]

Therefore, the Supreme Court of Illinois found that the "willful and wanton misconduct" standard derived in *Kobylanski* does not completely exonerate school districts from negligence. They are still expected to exercise reasonable, ordinary, and standard care in dealing with their pupils. It is also interesting to note that Justice Underwood, the author of this decision, was also the author of the *Kobylanski* decision.

Football cases even arise from girls' "powder-puff" football games, as demonstrated in *Lynch* v. *Board of Education of Collinsville Community School District #10* (390 N.E. 2d 526, 1979). This case involved injuries to Cynthia Lynch during such a game. The school had a history of holding powder-puff football games for the pupils. The teachers would provide the girls with general instruction for a couple of days before the game. The principal testified during the trial that he had ordered these games halted. Prior to the game, the teachers conducted five or six practices for the girls and instructed them to purchase some mouthguards. The girls were also given minimal instruction on football rules prior to the game. During the game, which was held on school property after the school day, Lynch was knocked down and had her teeth knocked out, her nose broken, and her face bloodied. She was

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taken to the hospital and received appropriate medical treatment. However, numerous witnesses testified that her behavior changed drastically after the accident. Before the accident, they said, she was friendly and outgoing; she got along well with others, was not disruptive, and did not present any disciplinary problems. However, they observed that after the accident she was hard to get along with and was easily angered. In fact, they testified, she was a totally different person and would be different from one second to the next.

The trial court jury found that the school was indeed guilty of negligence and awarded damages of $60,000. The school appealed the damage award as excessive. The school also appealed the case, claiming that the pupil's behavior could not possibly be affected by the minor injury, that the school did not sanction this activity, and that the award was much too great. The Illinois Court of Appeals found that there was more than enough evidence for the jury to find that this activity was authorized by the school. The game was a tradition at the school. It was announced on the school's public address system and the school bulletin boards. The girls were coached by teachers; practices and games were held on school property. The principal and assistant principal knew that the game was tackle football without equipment and that teachers were coaching the girls. Therefore, the appeals court held that it was indeed a school-related activity. It also held that Lynch suffered behavior difficulties as a result of the accident and that the $60,000 award was not excessive, given the damages. Thus the Illinois court upheld the pupil's suit and the $60,000 damage given her by the trial court jury.

Basketball. Many tort suits also originate in school-sponsored basketball. While the sport is not inherently particularly dangerous, the intensity of play frequently leads to a variety of injuries.

A case from North Carolina denied the father of a pupil killed during basketball practice any damages because of that state's sovereign immunity doctrine. *Clary* v. *Alexander County Board of Education #12* (203 S.E. 2d 802, 1974) involves the death of a basketball player during basketball practice. Roger Clary was a high school pupil and was running wind sprints during basketball practice one day. At the end of the basketball gymnasium were two glass doors. Apparently Clary was unable to stop, crashed into the glass doors, and suffered serious injury. He was taken to the hospital, where he subsequently died.

Clary's father brought suit against the school system, making three allegations: First, the school system permitted installation of the glass doors when it should have known that they would constitute a severe hazard to basketball players. Second, through its coaching staff, it directed players on the basketball team to run sprints toward a point immediately in front of the partition. Third, it maintained the gymnasium in a hazardous condition with respect to the partition. The father sought damages to cover costs of his son's hospital stay. The trial court dismissed all actions against the school district, claiming: 1) The school system was protected under the sovereign of immunity; 2) There was contributory negligence of the pupil; and 3) The purchase of liability insurance did not waive sovereign immunity.

The North Carolina Supreme Court heard the case on appeal and affirmed the decision of the trial court. Regarding the damages, the court said:

> There is, therefore, in the record before us a complete failure of evidence to show any damage suffered by the plaintiff's father, by reason of alleged negligence of the defendant. Consequently, the plaintiff's evidence was not sufficient to justify submitting the father's case to the jury.[38]

The high court also upheld the sovereign immunity of the school board and stated that the mere purchasing of liability insurance did not constitute a waiver of immunity. The court said, "For this reason the evidence of the plaintiff was insufficient to justify the submission of the boy's action to the jury and the defendant's motion for a directed verdict should have been allowed on this ground."[39]

Two other basketball cases involve court floor conditions that may have contributed to players' injuries. *Albers* v. *Independent School District #302 of Lewis City* (487 p. 2d 936, 1971) involved an injury to a pupil during an informal basketball game in the school gymnasium. Morris Albers, a high school pupil and also a member of the high school's basketball team, and five other boys persuaded the school janitor to allow them to use the gym during the Christmas holidays. The janitor allowed the boys in for one day. Albers cleaned the floor of the basketball court, and the group began playing. A shot came off of the backboard, and Albers collided with another boy as both attempted to get it before it went out of bounds. Albers hit his head against the opponent's hip, then fell to the floor on his back in a semiconscious state. Albers suffered a fracture in the cervical area of his spine, necessitating surgical correction and prolonged hospitalization.

The Idaho Supreme Court addressed two major issues in this case: The first was assumption of risk and the second adequacy of supervision. In addressing the first issue, the court stated:

> Physical contact in such a situation in an athletic contest is foreseeable and expected. The general rule is that participants in an athletic contest accept the normal physical contact of the particular sport. Nothing in the record would justify an exception to the rule here.[40]

This means that Morris, realizing the inherent danger of playing basketball, accepted the reasonable risk involved in physical contact in a basketball game.

Regarding the issue of supervision, the court stated, "The record lacks any evidence as to how the presence of a coach or teacher would have prevented collision of the boys chasing the rebounding basketball."

The court found that lack of supervision was not the proximate cause of injury. There was an obvious assumption of risk involved in this situation:

> Generally, schools owe a duty to supervise the activities of their students whether they be engaged in curricular activities or nonrequired but school-sponsored extracurricular activities.... Further, a school must exercise ordinary care to keep its premises and facilities in reasonably safe condition for the use of minors who forceably will make use of the premises and facilities.[41]

Therefore, the Idaho high court upheld the dismissal of the suit by the lower court.

A similar case occurred in Louisiana in 1975, when a high school basketball player was injured on an allegedly wet court during a Christmas tournament.[42] As did the Idaho court in the previous case, a Louisiana court upheld the dismissal of the suit against the sponsoring high school.

Track and Field. There are several interesting cases from the sport of track and field. *Bouillon* v. *Harry Gill Company* (301 N.E. 2d 627, 1973) concerns the injury of a 12-year-old, seventh-grade pupil during a pole-vaulting accident. The pupil, in the act of vaulting, hit the side support of the crossbar, then landed in the pit on his stomach. The side support crashed down upon him, and a steel pin in the support pierced the back of his head, causing a serious injury. The parents of the pupil sued the school district, alleging negligence, as well as the manufacturer of the standard (the metal upright supporting the crossbar) claiming that there should have been rubber pins instead of steel pins in the standard. After examining the accident, the Illinois court concluded that there was no negligence either on the manufacturer's part or on the coach's part. The case was appealed to the Illinois Court of Appeals. The appellate court found as follows:

> In the present case, it was for the jury, the fact-finding body, to weigh the contradictory evidence and inferences, judge the credibility of the witnesses, and draw the ultimate conclusion as to the facts. We are not free to reweigh the evidence and set aside jury verdict, merely because the jury could have drawn different inferences and conclusions from the facts. We are unable to state that the verdict of the jury in favor of the school district was against the manifest weight of the evidence.[43]

Thus the Illinois appellate court was unwilling to substitute its judgment for the jury's. Consequently, the suits against the manufacturer of the equipment and the athletic coach were dismissed.

Another track and field case involves an injury to a spectator,[44] Anita Bush, age 12, who lost the sight in her left eye during an after-school activity. Bush left her school one afternoon, went home, changed her clothes, and returned to the school grounds. Before she left, another pupil, Raymond Murry, asked his physical education instructor if he could use the school's high-jumping equipment. The instructor granted Murry's request and did not put any restrictions on the use of the equipment. During the afternoon Murry practiced high jumping. On one occasion he failed in a high-jump attempt, knocking the crossbar to the ground. His sister laughed at him. Raymond picked up the crossbar and threw it at her. He missed his sister and hit Anita Bush in the eye, causing the injury.

Bush's parents brought charges against Murry, the physical education instructor, and the school district for negligence. The trial court ruled in favor of all the defendants, claiming that there was no negligence. The parents appealed that decision to the Indiana Court of Appeals. The primary claim presented in the appeal was that the high-jumping equipment was potentially dangerous, hence the school was under obligation to provide supervision in its use.

Consequently, the Indiana Court of Appeals ruled that:

> To hold high-jumping equipment to be inherently dangerous would be the equivalent of saying that any instrumentality which could conceivably inflict injury, such as a book, a board, or bamboo fishing pole, would be inherently dangerous, giving rise to a duty of supervision.
>
> ...[W]e hold that high-jumping equipment is not an inherently dangerous instrumentality and therefore no duty arose on the part of the school to supervise students during non-school hours.[45]

The Illinois Court of Appeals sustained the trial court's dismissal of charges against the defendants. The high-jumping equipment was found not to be inherently dangerous, and therefore no special duty to supervise existed.

A recent Virginia case sustains a trend in court decisions to the effect that teachers are not protected under states' sovereign immunity (among states that still possess sovereign immunity).[46] Kenneth Short sued the school board, athletic director, baseball coach, and supervisor of buildings and grounds for gross negligence in connection with injuries he sustained from broken glass when he fell while running laps on the school track. Short's allegations were: ...[I]n violation of their duties, the defendants failed to inspect the premises, failed to discover their condition, i.e., the broken glass, and failed to warn the plaintiff of the dangerous condition of the track."[47]

The Virginia Supreme Court held the school district to be immune from suit, but allowed the suits against the other three defendants.

Hockey. A very interesting and important case was decided by the Massachusetts Supreme Court in 1978 concerning the sport of hockey. *Everett* v. *Bucky Warren, Inc.* (380 N.E. 2d 653, 1978) involved a 12-year-old student at a private school who was seriously injured in a hockey game when a puck hit his head between gaps in the helmet he was wearing. The injury required brain surgery, a plate was inserted in the pupil's skull. The pupil brought suit against the helmet manufacturer and the coach of the school for negligence. The trial court found the manufacturer negligent because of the way the helmet was constructed. It also found the coach negligent for requiring his players to wear such helmets. The pupil was awarded a total of $85,000 in damages. This case came to the Massachusetts Supreme Court, because the manufacturer sought a reversal in the trial court's ruling. The high court upheld the trial court's ruling, concluding that the manufacturer should have known that a hockey puck could hit someone's head where the pieces joined, since the helmet was designed in three pieces. The court also found the coach to be negligent in requiring his players to wear this particular type of helmet. The court specifically addressed the assumption of risk issue in this case:

> The plaintiff testified that he did not know of any dangers that he was exposed to by wearing the helmet. He believed, he said, that it would protect his head from injury. The helmet had been supplied to him by a person with great knowledge and experience in hockey, a person whose judgment the plaintiff had

> reason to trust. And it was given to him for the purpose implied, if not expressed, of protecting him.[48]

Consequently, the Massachusetts Supreme Court upheld the trial court's verdict and awarded the student $85,000 in damages, to be paid by the coach and the company that made the helmet.

Other Cases. There are, of course, numerous cases from other areas of extracurricular athletics, including baseball. In two similar cases, the courts have held that a baseball coach is not liable for injuries sustained during baseball games or practices if the coach is providing adequate supervision.[49]

Cases even come from generally safe summer recreational programs. *Stanley* v. *Board of Education of the City of Chicago* (293 N.E. 2d 417, 1973) is a suit brought by a student's parents against the Chicago School Board and a physical education instructor for injuries sustained in a summer recreation program. During a game of fast pitch, a rubber ball is thrown as hard as it can be against a wall; another pupil standing next to the wall attempts to hit the ball. An 8-year-old pupil was struck in the head by a baseball bat that slipped from the hands of an older pupil. A major issue at the trial was the testimony of an expert witness who testified that children who were playing fast pitch should be at least 50 feet away from each other. Apparently at the time of the accident, the young child who was hurt was only about 25 to 30 feet away from the other pupil, who was involved in another fast-pitch game. The jury in the trial court awarded $40,000 for injuries sustained by the plaintiff pupil. The school board appealed the case to the Illinois Appeals Court, claiming that the expert witness was not expert enough to determine whether 25, 30, or 50 feet was sufficient. The appeals court upheld the use of the expert witness, stating: "We think, therefore, the better role would give a trial judge a wide area of discretion in permitting expert testimony which would aid the triers of fact in their understanding of the issues even though they might have a general knowledge of the subject matter."[50]

Thus the Illinois Court of Appeals affirmed the judgment of the trial court, ruled in favor of the pupil, and awarded damages of $40,000.

Another interesting case, which does not fall into any of the above categories, is *Williams* v. *Board of Education of Clinton Community* (367 N.E. 2d 549, 1977). This case concerns a coach's football files, which he kept in a cabinet in his office. He was relieved of duty on Friday at the end of the football season and was asked to clear out the filing cabinet. He started to do so, but realized that he did not have enough boxes and left. When he arrived on the following Monday with more boxes, the files had disappeared. Trial court evidence shows that a pupil manager of the football team was told by the athletic director to get rid of all the materials over the weekend. The pupil had them thrown away, and they were burned. The coach sued for $50,000, claiming that was the value of his coaching files, which had taken him several decades to accumulate. Several other witnesses testified that the files were worth somewhere between $40,000 and $100,000.

The trial court found that determining the exact amount of damages was impossible; and since the coach could not specify damages, his claim could not be upheld. Therefore, the suit was dismissed. The coach appealed the case to the Illinois Court of Appeals. The appellate court reversed the trial court's ruling, finding that there was indeed negligence, and ordered a new trial for the coach to determine the amount of damages.

Summary

It may be somewhat presumptuous—or at least unnecessary—to draw conclusions for someone who has just read this chapter. However, a few simple rules derived from the illustrative cases may help physical education teachers or coaches avoid litigation in an area that is overwhelmed with court suits.

Documentation of proper instruction and maintenance of equipment is a must. Coaches and physical education instructors should use universally acceptable techniques in their activities. Trying out radical concepts may result in a finding of negligence if a pupil is injured during the use of such novel techniques. Also, avoid ordering or using less than the best athletic equipment available. Make sure that football helmets are in good shape and fit the pupil properly. Never allow a novice pupil to participate in an advanced activity.

The level of supervision is important in athletics. Seemingly safe activities have produced court suits. The degree of supervision should be related to the intensity of the activity, the degree of skill needed by participating pupils, and the danger inherent to the activity. For example, tennis requires less supervision than football.

It is acceptable to use simple, generally approved first-aid techniques when pupils are injured. However, physical education teachers and coaches should never attempt to go beyond minimal first-aid procedures unless they hold an EMT certificate, and even then only if absolutely necessary.

Notes

1. *Kersey* v. *Harbin*, 531 S.W. 2d 76 (1975).
2. Ibid.
3. *Kobylanski* v. *Chicago Board of Education* 347 N.E. 2d 705 (1976).
4. Ibid.
5. Ibid.
6. *Landers* v. *School District #203, O'Fallon*, 383 N.E. 2d 645 (1978).
7. Ibid.
8. Ibid.
9. *Grant* v. *Lake Oswego School District #7, Clackamos County*, 515 P. 2d 947 (1973).
10. Ibid.
11. Ibid.
12. *Larson* v. *Peterson*, 252 N.W. 2d 128 (1977), 289 N.W. 2d 112 (1979), rehearing denied (January 28, 1980).
13. *Baird* v. *Hosmer*, 347 N.E. 2d 533 (1976).
14. Ibid.
15. *Lueck* v. *City of Janesville, 204 N.W. 2d 6 (1973).*
16. *Banks* v. *Terrebonne Parish School Board*, 339 So. 2d 1295 (1976).
17. *Berg* v. *Merricks*, 318 A. 2d 220 (1974).
18. Ibid.
19. *Chapman* v. *State of Washington*, 492 P. 2d 607 (1972).
20. *Green* v. *Orleans Parish School Board*, 365 So. 2d 834 (1978), writ refused 1979.
21. Ibid.
22. *Ardoin* v. *Evangeline Parish School Board*, 376 So. 2d 372 (1979).
23. Ibid.
24. *Brackman* v. *Adrian*, 472 S.W. 2d 735 (1971).
25. Ibid.
26. *Stevens* v. *Shelbyville Central Schools*, 318 N.E. 2d 590 (1974).
27. *Brabatcek* v. *Millard School District, School District #17*, 273 N.W. 2d 680, 202 Neb. 86 (1979).
28. Ibid.
29. *Sutphen* v. *Benthian*, 397 A. 2d 709, 165 N.J. Super. 79 (1979).
30. *Zawadski* v. *Taylor*, 246 N.W. 2d 161, 70 Mich. App. 545 (1976).
31. *Hunter* v. *North Mason High School*, 529 P. 2d 898, 12 Wash. App. 304 (1974).
32. *Dobbins* v. *Board of Education of Henry Hudson Regional High School*, 335 A. 2d 58, 133 N.J. Super. 13 (1974).
33. *Sims* v. *Etowah County Board of Education*, 337 So. 2d 1310 (1976).
34. *Mogabgap* v. *Orleans Parish School Board*, 239 So. 2d 456 (1970).
35. Ibid.
36. *Lovitt* v. *Concord School District*, 228 N.W. 2d 479, 58 Mich. App. 593 (1975).
37. *Gerrity* v. *Beatty*, 373 N.E. 2d 1323 (1978).
38. *Clary* v. *Alexander County Board of Education #12*, 203 S.E. 2d 820 (1974).
39. Ibid.

40. *Albers* v. *Independent School District #302 of Lewis City*, 487 P. 2d 936 (1971).
41. Ibid.
42. *Nunez* v. *Isidore Newman High School*, 306 So. 2d 457 (1975).
43. *Bouillon* v. *Harry Gill Company*, 301 N.E. 2d 627 (1973).
44. *Bush* v. *Smith*, 289 N.E. 2d 800 (1973).
45. Ibid.
46. *Short* v. *Griffitts*, 255 S.E. 2d 479 (1979).
47. Ibid.
48. *Everett* v. *Bucky Warren, Inc.*, 380 N.E. 2d 653 (1978).
49. *Lutterman* v. *Studer*, 217 N.W. 2d 756 (1974) and *Passantino* v. *Board of Education of the City of New York*, 363, N.E. 2d 1373 (1977).
50. *Stanley* v. *Board of Education of the City of Chicago*, 293 N.E. 2d 417 (1973).

VI

Corporal Punishment and Assault and Battery

The intentional torts of assault and battery were discussed in Chapter I. While there are a few instances in education where assault and battery cases stand alone, assault and battery charges usually arise out of the administration of corporal punishment.

Corporal punishment remains controversial among both educators and lay persons. While many schools and several states have banned it, many states still authorize the use of corporal punishment as a means of controlling student behavior.

Legal Status

In the past five years the U.S. Supreme Court heard two cases concerning the legal status of corporal punishment. In the first of these, *Baker* v. *Owen* (395 F. Supp. 294, M.D.N.C., (1975), aff'd 423 U.S. 907 (1976)), a parent sought to restrict the use of corporal punishment on her child by school authorities. While the court agreed with the premise that parents have a fundamental right to choose whatever disciplinary techniques for their children they consider appropriate in the home, it did not subscribe to the argument that these rights extend into the school. Indeed, the court upheld the right of educators to administer corporal punishment even though the parents object to such punishment.

The court did, however, outline some minimal due process requirements for schools before they administer corporal punishment. These requirements include the following three steps:

> 1. Except for those acts of misconduct which are so antisocial or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehavior. The requirements of an announced possibility of corporal punishment and an attempt to modify behavior by some other means—keeping after school,

assigning extra work, or some other punishment—will insure that the child has clear notice that certain behavior subjects him to physical punishment.

2. A teacher or principal may punish corporally only in the presence of a second school official (teacher or principal), who must be informed beforehand and in the student's presence of the reason for the punishment. The student need not be afforded a formal opportunity to present his side to the second official; this requirement is intended only to allow a student to protest, spontaneously, an egregiously arbitrary or contrived application of punishment.

3. An official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present.[1]

Therefore, the U.S. Supreme Court has provided some minimal due process procedures before administering corporal punishment. Educators should follow the following five steps before administering corporal punishment:

1. Corporal punishment, generally, should not be used in a first-offense situation.
2. The students should be aware of what misbehaviors could lead to corporal punishment.
3. Another adult witness should be present during the administration of corporal punishment.
4. The student should be told (in front of the adult witness) the reason for the punishment.
5. Upon request, the disciplinarian should inform the student's parents of the reasons for such punishment.

In 1977 the U.S. Supreme Court ruled on another issue concerning corporal punishment. *Ingraham* v. *Wright* (97 S.Ct. 1401, 1977) dealt with the issue of excessive punishment and whether such punishment violates the cruel and unusual punishment clause of the Eighth Amendment and with the due process issue presented in *Baker* v. *Owen*.[2]

The case came from Dade County, Florida, where the use of corporal punishment was specifically authorized in school board policy. Board policy contained explicit limitations in the administering of corporal punishment. In the fall of 1970, two students were subjected to an alleged abuse of corporal punishment. One student was struck 20 times (15 more than board policy authorizes) with a flat wooden paddle because he was slow in responding to his teacher's instructions. The other student was paddled so severely on his arms that he lost full use of them for over a week.

The case came to the U.S. Supreme Court with two issues: First, was the use of corporal punishment in violation of the Eighth Amendment (which prohibits the use of cruel and unusual punishment)? And second, was some type of procedural due process required before a teacher or other disciplinarian could administer corporal punishment?

The court found, in a 5-4 decision, that the use of corporal punishment in schools is *not* in violation of the Eighth Amendment. Therefore, corporal punishment is *not* cruel and unusual punishment. Concerning the matter of a due process hearing, the court said: "We conclude that the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law."[3]

The court did assume, however, that if a student denied having committed the infraction, the disciplinarian should investigate the facts before proceeding with the punishment.

In summary, the *Ingraham* v. *Wright* decision says that corporal punishment does not violate the Eighth Amendment banning cruel and unusual punishment, nor does its use require a formal due process hearing (although an informal investigation of facts was encouraged). Consequently, educators may use corporal punishment without fear of becoming entangled in a federal suit.

Local Policies

In many states that either authorize the use of corporal punishment or have no state control over the issue, the local school board can develop policies governing corporal punishment. Some school board policies restrict the use of corporal punishment or ban it altogether. In other instances board policies may establish strict procedures in administering corporal punishment.

In one state, Virginia, local school boards cannot restrict corporal punishment or ban it, since state statute specifically authorizes it. An opinion by the attorney general asserts that teachers and principals have the right to use corporal punishment in that state. Therefore, before educators consider using corporal punishment as a means of discipline, they should check local board policy and state laws to determine if such punishment is restricted or banned. If state laws and local board policy permit the use of corporal punishment, then it may be used. If local board policy or state law further restricts the use of corporal punishment, then these policies or laws are also applicable. One such common restriction is that only principals or vice-principals are authorized to administer corporal punishment. Many states do not permit teachers to use this disciplinary measure.

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Liabilities

Even though the use of corporal punishment may not be restricted by state law or local board policy, the abuse of this disciplinary technique can have serious consequences. Indeed, in *Ingraham* v. *Wright*, the U.S. Supreme Court suggested that excessive corporal punishment may well violate various state statutes (child abuse, assault, battery) and complainants could seek criminal action as well.

There is no exact point at which the use of corporal punishment becomes excessive. Such a determination is based on society's attitudes and local values. However, almost every state statute that authorizes the use of corporal punishment contains some restrictive statement or phrase. For example, such punishment cannot be "excessive," "unreasonable," or "with malice." The state is not going to permit educators to abuse or harm students with immunity under state laws.

What factors, then, should be taken into account in determining if corporal punishment is "excessive"? One might want to consider 1) the gravity of the offense, 2) the frequency of the offense, 3) the age of the student, 4) the size of the student, 5) the size of the disciplinarian, 6) the implement used in delivering corporal punishment, 7) the attitude and disposition of the disciplinarian, and 8) the sex of the student. As Richard Vacca, a renowned school law professor puts it, "No matter how big the student is, and how small the teacher is, when standing before a judge, the student looks a lot smaller and the teacher a lot bigger."

Parents who are knowledgeable about the law can make life quite unpleasant for an educator who uses corporal punishment on their child. While the educator may have complied with all state laws and board restrictions, the following can easily happen:

First, the parents become aware of the fact that a teacher used corporal punishment on their child. They then go down to the local police station and file criminal assault and battery charges against the teacher. The police must process the complaint by arresting the teacher. Of course, the board will have to suspend the teacher (probably without pay) pending the outcome of the trial. The teacher will have to hire an attorney to represent him or her (tort insurance will not cover criminal charges). In almost every instance the teacher will win the case. However, there has been a lot of grief and lost time.

While all of this is occurring, the parents also report the teacher for child abuse. The state's agency charged with handling child abuse cases will investigate the matter and clear the teacher of any wrongdoing. However, a file with the teacher's name on it will be kept in the agency's records for 10 years to determine if there is a pattern of child abuse.

Then, just to top things off, the parents may file an assault and battery tort suit against the teacher and ask for $100,000 in damages. If the teacher has tort insurance, the insurance company's attorney will represent him or her; otherwise an attorney will have to be hired. There is little doubt that the teacher will win the case. However, the teacher's life during this entire process has been less than pleasant. Can the teacher countersue for harassment? In a few states, yes (but he or she will probably lose). In most states, no. The bottom line of this scenario is that while the teachers have won a very large proportion of corporal punishment/assault and battery cases, corporal punishment is still a high-liability procedure.

In Loco Parentis. Many educators have won assault and battery type cases because of the *in loco parentis* doctrine. As noted earlier, it is a long-standing common law doctrine that educators stand *in loco parentis* (in the place of the parent) to the child while in school. Some state courts have held that before an educator can be held liable for assault and battery, the parents have to be found so in similar circumstances. This is because the educators are the "parents" while the children are in school.

Cases

Most assault and battery cases are quite similar. Usually a teacher uses physical force with a pupil and the pupil is injured. The pupil and/or parents file an assault and battery tort suit against the teacher.

An older yet classic case came out of Alabama in 1949. In *Suits* v. *Gover* (71 So. 2d 49), the court held the teacher not liable in an assault and battery case. In justifying its decision, the court said: "To be guilty of an assault and battery, the teacher must not only inflict on the child immoderate chastisement, but he must do so with legal malice or wicked motives or he must inflict some permanent injury."[4]

More recent cases echo these requirements. In *Simms* v. *School District Number 1, Multnomah County* (508 P. 2d 236, 1973), an Oregon court upheld a jury verdict finding the teacher not liable. A 14-year-old male pupil with a history of deportment problems was becoming troublesome in an eighth-grade class. The male teacher started to help the student leave by holding his arms at his side and pushing him towards the classroom door. As the teacher opened the door, the pupil swung his arm, crashing it through the glass in the door and sustaining injury. Testimony from other pupils confirmed the teacher's version that the misbehaving pupil was jumping up and down, kicking, trying to get loose.[5] The appellate court, in upholding a jury verdict that the teacher was not liable for assault and battery, pointed to an Oregon statute that states:

> A parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person may use reasonable physical force upon such minor or incompetent person when and to the extent he reasonably believes it necessary to maintain discipline or promote the welfare of the minor or incompetent person. ***A teacher may use reasonable physical force upon a student when and to the extent the teacher reasonably believes it necessary to maintain order in the school or classroom.*** (Emphasis supplied by the court.)[6]

An Arizona court also found a physical education teacher not liable for assault and battery in *LaFrentz* v. *Gallagher* (462 P. 2d 804, 1970). In this case a 12-year-old, seventh-grade boy was called "out" during a softball game by Frank Gallagher, the physical education instructor. As the pupil walked off the field, he kicked the dust in disgust. Gallagher came up to the pupil and threw him against the backstop, saying, "I don't want any more of your Little League lip, punk!"[7] Apparently, at the trial the lower court refused to allow the pupil's lawyer to admit evidence of Gallagher's previous history of physical abuse of pupils. The lower court ruled in favor of the teacher. In affirming the lower court's ruling, the appellate court stated:

> It is a well-established principle of law in an action against a school teacher for damages for battery that corporal punishment which is reasonable in degree administered by a teacher to a pupil as a disciplinary measure is "privileged," and does not give rise to a cause of action for damages against the teacher. The courts have held that the teacher is *in loco parentis*, so that the crucial question that arises is the reasonableness of the punishment... There was a conflict in the evidence as to the degree of punishment. This question of reasonableness was submitted to the jury under proper instruction. The jury accepted Gallagher's version.[8]

The court also ruled that Gallagher's previous history had no bearing on the present case.

Two interesting cases where teachers were found liable for assault and battery came out of Louisiana. In *Frank* v. *Orleans Parish School Board* (195 So. 2d 451, 1967), a 14-year-old boy sustained a broken arm when his physical education teacher grabbed him. There is conflicting testimony as to exactly what occurred immediately before the injury. The pupil claims that the teacher chased him around the gym and broke his arm when he caught him, lifted him up, and shook him. The teacher claims that the pupil attempted to strike him and that the arm was broken when he grabbed it in an attempt to restrain the pupil. The pupil sued for $11,080.05 in damages. The trial court awarded $2,500 in damages to the pupil from the teacher and the school system. The appellate court ruled that the teacher used excessive force, regardless of whose version is actually true:

> It taxes our credulity to believe that Henderson [the teacher] in good faith actually believed that his physical safety was endangered by a blow from Reginald. However, even assuming arguendo that Reginald did make an effort to strike Henderson and that he in fact did grasp the arms of Reginald in order to restrain his belligerence, such simple restraint by Henderson would have accomplished his objective, and not further physical effort of any kind was then required. In any event, the evidence preponderates and the trial court obviously concluded therefrom that Henderson's physical effort went further than mere restraint and that he actually lifted the boy from the ground, shook him in anger, and then dropped him to the floor. Henderson's actions in lifting, shaking, and dropping the boy were clearly in excess of that physical force necessary to either discipline or to protect himself, and subjects the defendants to liability for the injuries incurred as a result thereof.[9]

The second case is *Johnson* v. *Horace Mann Mutual Insurance Company* (241 So. 2d 588, 1970). In this case a Louisiana appellate court awarded $741.95 in compensatory damages (medical expenses) and $1,000 in punitive damages to a high school pupil who was severely beaten by his physical education instructor. Evidence indicates that Jimmy Pharr, the pupil, was given two beatings with a wooden paddle that left bruises "behind the right ear, the left shoulder, the left buttock, and left thigh."[10] The pupil was hospitalized for three days as a result of the beatings. The parents sued the principal as well as the teacher. They claimed that the principal had been aware of the teacher's dangerous manners in administering punishment and should have anticipated a student injury as a result of an excessive whipping.

The court concluded that there was no evidence to suggest that the principal knew about the teacher's excessive punishments and was therefore not liable. However, the court did hold the teacher liable: "The broken paddle, the bruises, and the testimony of the witnesses do not speak of reasonable punishment for gross misconduct; rather, the whipping given was excessive and unreasonable, if not premeditated, administered for a slight deviation from the required normal conduct."[11]

Usually, private schools are given much more protection by the courts than public schools are. However, in *Baikie* v. *Luther High School South* (366 N.E. 2d 542, 1977), the court found a private school teacher liable for assault and battery. Donald Baikie, a high school student, was standing in the hall outside his classroom prior to class. Norman Meier, a teacher, approached the student, grabbed him by the collar, and threw him up against the lockers for no apparent reason. Baikie filed suit, alleging wanton and willful assault and battery. The jury awarded Baikie $25,000 in damages. The private school appealed the case to the Illinois Court of Appeals. This court, following a prior court decision requiring proof of "willful and wanton misconduct,"[12] found that the evidence showed a willful and wanton assault and battery by the teacher, "committed under circumstances exhibiting a reckless disregard for the safety of others."[13]

Williams v. *Cotton* (346 So. 2d 1039, 1977) is a case in which a teacher was found liable for assault and battery by a Florida jury. Charles Cotton, a mentally retarded 16-year-old, was enrolled in Joseph Williams' class in Griffin Middle School. Cotton apparently became unruly and boisterous on several occasions so that Williams reprimanded him. Cotton became so disruptive that Williams used physical force to maintain classroom order. Cotton sued Williams for assault and battery. The jury ruled in favor of the pupil, Cotton. The Florida appellate court affirmed the jury's decision.

Hogenson v. *Williams* (542 S.W. 2d 456, 1976) involved overzealousness by a football coach. Roy Hogenson was a seventh-grade football player who, during a practice session, was not performing up to his capabilities, in the view of the football coach, Williams. Williams struck Hogeson's helmet with enough force to knock the player to the ground, then grabbed his face mask and pulled him around. The pupil sustained a "severe cervical sprain and bruising of the brachial plexus," necessitating an eight-day hospital stay and several months for full recovery.[14] The trial court judge, in his instructions to the jury, made "intent to harm" a vital element of the assault and battery charge. The jury found for the teacher, given this narrow definition. The Texas appellate court overturned the jury's decision, stating that the trial court judge erred by requiring "intent" as an element of assault and battery: "By instructing the jury...that 'intent to injure is the gist of an assault,' the trial court unduly restricted the type of conduct which could be considered as an assault and in effect deprived appellants of the right, under their pleadings, to recover for other types of conduct condemned by the statute."[15]

The court found the teacher's defense, "attempting to instill spirit in the pupil," shallow: "Although appellee testified that the physical contact he used was not for the purpose of disciplining the child, he stated it was administered for the purpose of 'firing him up' or 'instilling spirit in him.' He thus contends that the phrase 'for the purpose of instruction and encouragement,' as used in the instruction and issue, properly applied the law to the facts of this case. We do not agree."[16]

The use of physical discipline in order to provide performance incentive was also rejected by the court: "But we do not accept the proposition that a teacher may use physical violence against a child merely because the child is unable or fails to perform, either academically or athletically, at a desired level of ability, even though the teacher considers such violence to be instruction and encouragement."[17]

Sometimes the teacher is singled out for liability in suits brought against the teacher and the school board, as in *Carr* v. *Wright* (423 S.W. 2d 521, 1968), an assault and battery case. A junior high school female pupil, Geraldine Carr, sued both the male teacher who disciplined her with corporal punishment and the school board. The trial court dismissed the suits against both, claiming governmental immunity. However, the Kentucky appellate court reversed the decision regarding the teacher, stating that while the school board may be immune from assault and battery suits, teachers are not.

In another interesting case, a teacher was sued for being the proximate cause of injury in an assault and battery case even though he hit no one. In *Collins* v. *Wilson* (331 So. 2d 603, 1976), a fight broke out between two pupils in a masonry class taught by Alvin Wilson. One pupil injured another by striking him with a brick. The injured pupil sued the shop teacher for being the proximate cause of the injury because of his failure to stop the fight. The court ruled in favor of the teacher, stating:

> In any event...the record clearly reflects that Mr. Wilson could not have prevented the act which caused the damage under the circumstances of this case. We are of the opinion that he did everything in his power to prevent Rogers from striking plaintiff with a brick, but was unable to do so.[18]

The California Superior Court recently ruled on an important corporal punishment case. *Slifer* v. *Vista Unified School District* concerns the excessive punishment of a mentally retarded teenager by her high school principal. Patty Slifer was severely beaten by her high school principal with a fraternity "hazing paddle." There is evidence that the principal struck Slifer nine times within the two-day period. The school district used a consent form signed by Slifer's mother in 1977 as defense. However, Mrs. Slifer stated that she was unaware of the severity with which corporal punishment was used.

The pupil and her mother sued the school district for $100,000, but the school system settled out of court for $20,000. The Superior Court of California accepted the settlement between the two parties.

Summary

A fair number of cases in educational law involve corporal punishment and/or assault and battery. While corporal punishment is not a federal issue and may be allowed (though restricted in various ways) by state law, it is still a high-liability procedure. In a high percentage of cases the courts side with the teacher. However, if there is any evidence of "excessive" corporal punishment, the courts may rule for the pupil. It has been a long-standing legal principle that what constitutes "excessive" corporal punishment is individual and particular to each case. However, there are some rules of thumb that may provide guideposts in this legal area. Kern Alexander, in *Public School Law (1980),* suggests that courts take the following into account in deciding assault and battery/corporal punishment cases: 1) proper and suitable punishment device, 2) part of person to which it is applied, 3) manner and extent of chastisement, 4) nature and gravity of offense, 5) age of pupil, 6) temper and deportment of teacher, and 7) history of pupil's previous conduct.[19]

Teachers of course have the right to self-defense when being battered by pupils. However, educators should be sure that physical actions are limited to "defense" only and that the teacher does not become the aggressor in physical circumstances.

Courts seem to tie "excessive corporal punishment" and assault and battery together in many tort cases. Usually, assault and battery liability is closely connected with intent, malice, and/or reckless physical abuse. From the cases cited above, the totally unnecessary physical extremes exhibited in those cases where the educator was found liable are the exceptions to the rule. But that is why they became prominent cases in school law.

The best advice to educators for avoiding litigation in this area of tort law is so simple that it is frequently forgotten: Be careful, be professional, and be reasonable.

Notes

1. *Baker* v. *Owen* 395 F. Supp. 294 (1975) aff'd 423 U.S. 907 (1976).
2. Ibid.
3. *Ingraham* v. *Wright* 97 S.Ct. 1401 (1977).
4. *Suits* v. *Gover* 71 So. 2d 49 (1949).
5. *Simms* v *School District Number 1*, Multnomah County 508 P. 2d 236 (1973).
6. Oregon Statute 339.250
7. *LaFrentz* v. *Gallagher* 462 P. 2d 804 (1970).
8. Ibid.
9. *Frank* v. *Orleans Parish School Board* 195 So. 2d 451 (1967).
10. *Johnson* v. *Horace Mann Mutual Insurance Company* 241 So. 2d 588 (1970).
11. Ibid.
12. *Kobylanski* v. *Chicago Board of Education* 347 N.E. 2d 705 (1976).
13. *Baike* v. *Luther High School South* 366 N.E. 2d 542 (1977).
14. *Hogenson* v. *Williams* 542 S.W. 2d 456 (1976).
15. Ibid.
16. Ibid.
17. Ibid.
18. *Collins* v. *Wilson* 331 So. 2d 603 (1976).
19. Kern Alexander, *Public School Law (St. Paul, Minn.: West Publishing Company, 1980), p. 692.*

VII

Defamation of Character

Defamation is a very interesting area of tort law. Basically, defamation has to do with libel and slander. The tort of defamation has an unusual and not particularly stable background. Even William Prosser states: "It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word."[1] In spite of the dubious background, however, defamation has blossomed into a tort that creates a substantial amount of litigation in courts today. Education has not been unaffected.

Generally, defamation-of-character suits in education occur in one of three situations. The first concerns pupil records and evaluations. Pupils have sued teachers, guidance counselors, and administrators for defamation of character for comments contained in pupil record files. Unkind comments in such files can keep pupils from obtaining jobs or being admitted to college. Or they "generally diminish the pupils' worth." Pupils now have access to their school records as a result of the so-called Buckley Amendments[2] (discussed later in the chapter). When they discover statements that allegedly defame their character, they have sued the teacher responsible. A second area that generates defamation suits are teacher evaluations. Frequently a teacher will apply for a job at another school system and ask her current principal for a letter of recommendation. In some cases the principal will give the other school system a negative recommendation. The teacher then sues the principal for defamation of character. The third situation where defamation cases occur is when parents or other citizens say defamatory things about educators either in public or at a school board meeting.

In order for an individual to bring a defamation suit against someone successfully, some kind of derogatory communication must be made to a third person. Derogatory words and insults directed at an individual himself do not constitute defamation of character. The injured person may bring a mental anguish suit against the person who directed the derogatory words, but not a defamation suit. Indeed, the entire purpose of a defamation suit is to protect individuals from the rumor process that begins with a third person. Prosser defines defamation as follows: "Defamation is rather that which tends to injure reputation in the popular sense; to diminish the esteem, respect, goodwill, or confidence in which the plaintiff is held, or to excite adverse, derogatory, or unpleasant feelings of opinions against him."[3]

The fact that a communication may diminish a person by subjecting him to scorn, hatred, or ridicule is a perfectly adequate reason to bring a defamation suit, but there are other bases for defamation suits. A woman whose name has been reported in a local newspaper as having been raped is certainly not held up to scorn, hatred, or ridicule. Instead, the reporting of this person's name may bring sorrow and pity. Yet reporting the name could be defamatory because it invaded her right to privacy and elicited feelings of pity toward her. Also, defamation can only be done to a living person. It is not legally possible for a defamation suit to be brought on behalf of a dead person (or estate). However, corporations and public entities, while not having human characteristics, can be defamed in good name and reputation.

Defamation of character has three elements: 1) There is an untrue statement; 2) It must diminish a person; and 3) There must be actual monetary loss.

The untrue statement must be communicated. If the statement is in writing, it is called libel. If the statement is by word of mouth, it is called slander. This false communication must diminish a person by subjecting him to scorn, hatred, ridicule, or eliciting feelings of sorrow and pity.

The concept of actual monetary damages evolved from the period in Western history when defamation was controlled by ecclesiastical law. Libel and slander were considered to be sins, and some kind of temporal damage had to be proven before claims would be sustained in ecclesiastical courts. However, some exceptions to this concept of actual monetary damages are developing. Basically, there are four kinds of slander suits in which no damages are required to be proven, viz., those involving false communication about 1) crime, 2) "loathesome disease," 3) business, trade, professions, and 4) unchasity.

If a false communication is made to the effect that a person has committed a crime, particularly a felonous crime, that person may collect damages without proving any actual monetary damages. The concept of "loathesome disease" originally stemmed from false statements to the effect that someone had a venereal disease. It has been extended to such other diseases as leprosy, smallpox, tuberculosis, and cancer. If there is a false statement alleging that an individual has loathesome disease, the individual who has been defamed may recover monetary damages even though such monetary damages cannot be proven. The third exception has to do with communications regarding business, trade, professions, or office. A false communication about a business, for instance, may ultimately cause that business to suffer monetarily. However, it is very difficult to determine the extent of such monetary damages, since they may accrue over long periods of time. Consequently, courts have exempted businesses that have been defamed from proving monetary damages. They may seek such damages from the courts without proof that they actually suffered them. The fourth category where no proof of monetary damages is concerned involves accusations regarding unchasity. While the unchasity of women was once the primary emphasis in this category, it has been extended to both sexes. The concept here is that false accusations regarding the chasity of an individual holds that individual up to scorn and possibiy will subject that individual to prosecution for adultery, fornication, or illegal cohabitation. Consequently, anyone who is defamed through words alleging unchasteness may acquire monetary damages without having to prove that such damages were actually incurred.

In recent years there has been a major shift in the courts' approach to defamation suits. At one time a suit of this kind could not be won if the defamatory statement could not be proven untrue. No matter how damaging a true statement might be, it was held that the truth was the ultimate and absolute defense. However, modern courts are beginning to change their attitudes toward this requirement. Instead of attempting solely to discover the truth, some modern courts look at the intent of the statement. If there is malice or an intent to cause harm, a defamation suit may be substantiated, whether or not the communication at issue is true. This means that an individual who passes information to others, with an intent to harm, may be held accountable for defamation in a modern court of law, irrespective of the accuracy of the information transmitted.

There are two major defenses in defamation suits. The most powerful of these is the "defense of absolute immunity." Absolute immunity is present when individuals who make statements cannot be sued for defamation of character regardless of the content, the truth, or the intent of the statement. There are six areas in which persons enjoy this immunity: 1) judicial proceedings, 2) legislative proceedings, 3) executive communications, 4) where there is consent of the plaintiff, 5) husband and wife communications, and 6) political broadcasts.

Only in the above-mentioned circumstances is the defense of absolute immunity or absolute-privilege communication enjoyed. The reason for the judicial proceedings exemption is obvious. A judge must be free to administer justice without worry about defamation suits or political repercussions. Consequently, the law exempts justices sitting at the bench from defamation suits. At times school boards enjoy absolute-privilege communication for judicial reasons. When a school board is conducting a hearing (which can occur for a variety of purposes: teacher dismissals, administrator dismissals or reassignments, student suspensions or expulsions, special education hearings, etc.), it is acting in a quasi-judicial manner. Consequently, some courts have extended judicial absolute privilege to school boards in such circumstances.

Legislative proceedings are also exempt from defamation suits. In this country such legislative proceedings include the federal Congress, state general assemblies, local boards of supervisors, and school boards. Senators and congressmen are immune from defamation suits for whatever they say on the Senate or House floor. Perhaps the best example of this was in the 1950s when Senator Joseph McCarthy made untrue statements about many individuals in this country. McCarthy was immune from defamation suits because his statements were made on the floor of the Senate. This legislative privilege has been extended to school board meetings. Most courts have held school board hearings to be quasi-legislative in nature and consequently entitled to legislative absolute privilege while the board is in session.

Executive communications are also immune from defamation suits, but only at the top levels of government. The President and the Vice President, in discussing situations in the Oval Office, are immune from defamation suits. Governors of states (and their staffs), county or city executives (at official meetings), and school superintendents are also covered under executive privilege. Absolute privilege has been extended to the latter because superintendents must be able to speak truthfully in reporting to the school board. This category also contains the well-known absolute-privilege communication relationship of lawyer and client and of doctor and patient. Statements made between these individuals are privileged communication, and one individual cannot sue the other for defamation.

The fourth defense to defamation suits is the consent of the plaintiff. This generally means that the individual actually gave his consent or sought the defamatory statements made about him. He consequently cannot seek damages for defamation of character.

The fifth exemption is between husbands and wives. A husband can say anything he wishes about his wife, and vice versa, and neither can be sued for defamation of character. This is simply an extension of the common law principle that a husband and wife cannot sue each other. This common law principle has been eroded recently in some states as a result of some court decisions regarding marital rape, and of course this immunity breaks down in situations involving divorce or separation.

The last area of immunity is political broadcasts. The Federal Communications Act of 1934 required radio stations to provide equal time to all political candidates seeking political office. It also specified that they may not censor any of the statements or information contained in the political candidates' speeches. The Act's provisions now apply to television as well. Consequently, stations should not be held accountable for defamation of character as a result of something a political candidate says. Hence U.S. courts have allowed this exemption to defamation suits for radio and television broadcasts.

It should be obvious that situations that enjoy absolute-privilege communication or absolute exemptions to defamation suits are very narrowly drawn and are very few in number. However, there is a second category of exemptions to defamation suits that is much more popular. It is known as the qualified-privilege exemption or communication. Qualified-privilege exemptions are also known as conditional-privilege exemptions. Perhaps the word "conditional" helps to make their purpose clear. The communication may be necessary between two individuals; however, there must be a reasonable purpose for the communication.

Generally, there are four elements in qualified-privilege communication: 1) duty to inform, 2) belief in the truth of the statement, 3) reason to believe in the truth of the statement, and 4) limited information.

The duty to inform may be the most important element of the qualified-privilege communication. Before the communication can be qualified or conditional, there must be a duty to inform someone. Perhaps a good example of this is the guidance counselor who receives information from a pupil regarding drug use. If the counselor passes this information on to the pupil's parents, the parents cannot sue the guidance counselor for defaming the good character of the pupil. Indeed, there is a duty to inform here. The courts will uphold the party imparting privileged communication so long as a real and reasonable duty to inform exists.

The second element of qualified-privilege communication is belief in the truth of the statement. The party who is transferring information from one person to another must believe in the truth of the statement, even if such information is revealed later to be untrue. At the time the communication is made, if the person believes in the truth of the statement, this exempts him or her from defamation suits.

The third element is reason to believe in the truth of a statement. The individual must have reasonable, logical reasons to believe that what he is saying is true.

The fourth element is very important. When information is exchanged between two people and the information is of defaming caliber, the information must be exchanged in an honest, forthright, and reasonable fashion. No additional information—information that is irrelevant and unconnected with the circumstances—should be provided. Moral judgments regarding someone's behavior fall into this latter category, i.e., they are not limited to the facts but are conclusions.

An example that embodies these elements may make the concept of qualified-privilege communication a little easier to understand. If a female high school student tells her guidance counselor that she is pregnant and that she is contemplating suicide, the guidance counselor may pass this information on to the student's parents. The four elements of qualified-privilege communication exist here: 1) The counselor obviously has a duty to inform; 2) The counselor believes in the truth of the statement; and 3) The counselor has reasonable grounds to believe it is true (i.e., the pupil told him); 4) The counselor does not make any moral judgments about the student's lifestyle or moral caliber. He simply informs the parents of the facts as told to him by the student. Even if such information is false (assume that the student lied), the counselor could not be held liable for defamation of character, since the four elements of qualified-privilege communication exist.

There are some interesting cases in which courts have extended conditional privilege to parents and citizens who attend school board hearings. In most of these cases parents or community members have criticized a teacher or an administrator in open (to the public) school board meetings. The criticized educator usually sues the parents for defamation of character. Courts have held that parents and community members have qualified privileges in such circumstances, because unacceptable performance by educators should be brought to the attention of the school board. However, courts have only granted this conditional privilege in school board meetings and where the complaining parties believe that their statements are true. Parents and community members may be liable for defamation of character for statements made outside the school board meeting or for statements made in school board meetings that they know are untrue.

Pupil Records

The issue of defamation of character strongly affects education because of the necessity to keep student records. States have passed freedom of information acts of various types, giving students access to their school records. Also, federal legislation now requires educators to allow students and/or their parents the freedom to inspect the entire education file if desired. As noted earlier, this legislation is known as the Buckley Amendments, (named for former Senator James Buckley of New York), which are part of the Family Education Rights and Privacy Act of 1974 (P.L. 93-380). Basically, the Buckley Amendments seek to do two things. First, they open a student's entire educational file for inspection by the student (if over 18 years old) or his or her parents (if the student is under 18). Second, they close this educational file to all individuals except those immediately concerned with the pupil's education. All educational files prepared on or after January 1, 1975, are regulated by the Buckley Amendments. The amendments are not retroactive, however, to files developed earlier than that date.

"Entire educational file," as used above, means grades, standardized test scores (including IQ), attendance records, discipline records, special work-ups for such things as special education classes, any psychological evaluations that were done, and teacher comments. The law does not require that all this information be contained in a single file. Indeed, most school districts usually keep the more sensitive data (psychological evaluations and special education work-ups) in a special file in the central office. However, there must be some reference in the school's files indicating that more information about the pupil is contained in the central office, if this is the case. The school has 45 days in which to comply with a request by the student or parent to inspect these records. the student or parent may also obtain a copy of all the information in his file. Schools may charge a reasonable reproducing fee for this copy.

The courts have consistently held that educators are liable for defamation of character for any information contained in a pupil's records. This means that teachers are liable for the comments they write for a pupil's permanent record file. Courts have also decided that the statute of limitations (two to seven years in most states) on defamation cases begins when the defamation is discovered by the student, not when it was written by the teacher. This means that a teacher may be held liable years after a defamatory statement was written about a student.

After passage and implementation of the Buckley Amendments, many school divisions purged their pupil records of any subjective material. Most pupil records in school districts now simply contain grades, attendance records, and standardized test scores. However, some teachers find it important to make statements regarding a student's character and/or deportment. These statements should be worded very carefully. Since the truth of the statement is one of the defenses against defamation charges, the teacher should be careful that any information written into the student record be objective and factual. The truthfulness of the information should be unquestioned. The teacher should be careful not to draw any conclusions for the reader. For example, a pupil may be a bully who beats up the other pupils in class. If the teacher were to write, "Johnny is a bully and enjoys beating up the other children," the teacher could be held liable for defamation. What is the definition of a bully? What do you mean by beating up on other children? How many times? And so on. These statements are general, subjective observations that are very difficult to prove. The teacher could write, however, the following: "Johnny has been involved in 15 fights in the last three days." This is a factual, objective, measurable statement. It does not draw any conclusions for the reader. The authenticity of this statement can be easily verified. In other words, any other teacher, given the same situation, could easily have written the same statement. It is also important for teachers to remember not to use psychological terms in pupil records. Very few teachers have the background to properly use, and defend the use of, such terms. Leave psychological terms to school psychologists and psychiatrists. Teachers should be concerned primarily with factual events as they occur. Generally speaking, the less a teacher writes for a pupil's file, the safer the teacher is from defamation suits.

The reason the plural is used when referring to the Buckley Amendments is that the original amendment allowed students to see their letters of recommendation from teachers. After hearing screams of protest, Buckley amended his original amendment to allow pupils to waive the right to inspect letters of recommendation. On most standard pupil recommendation forms, a student can now check a box indicating that he waives the right to see the recommendation. When a student does this, the educator may write a frank and forthright evaluation without fear that the student will see it. However, the pupil has the right *not* to waive inspection of a recommendation. Hence waiver of the right of inspection is solely at the discretion of the pupil. In any case, educators should be careful how they word student recommendations to prospective employers, higher education institutions, or other institutions that may need information about the student. It is particularly important to make sure that one's recommendation does not contain a hidden meaning. For instance, a teacher should not write, "With time, you will come to know this student as I have come to know this student." (This sentence can either be taken as derogation or as a positive statement.) Above all, do not put in a pupil's file what one New York City teacher felt necessary:

> A real sickie—abs., truant, stubborn, and very dull. Is verbal only about outside, irrelevant facts. Can barely read (was a large accomplishment to get this far). Have fun![4]

Numerous horror stories indicate that educators often overreact to pupil behavior or reveal their own questionable mental attitudes in outlandish statements they write in student files. For example, Aryeh Neier reported this case in *Dossier: The Secret Files They Keep on You:*

> A mother of a junior high school boy sneaked a look at another school record. She found that a teacher in second grade had said her son had exhibitionist tendencies. After considerable effort, the woman tracked down the teacher, who had by then left the school system. The "exhibitionist tendencies" label had been pinned on her son because of a single incident in which he had rushed out of a lavatory unzippered.[5]

Employee Evaluations

Another area where there has been litigation in education regarding defamation of character is employer evaluations. In most of these cases teachers attempt to sue principals or superintendents for making negative recommendations about them either to prospective employers or to the teachers' current school boards. It has long been held in defamation law that public officials have not only the right but the duty to make objective evaluations of the people in their employ and to report these to the governing body. A Massachusetts court may have explained this best in a case involving defamation: "Where a person is so situated that it becomes right in the interest of society that he should tell to a third person facts, then, if he *bona fide* and without malice does tell them, it is privileged communication."[6] Consequently, principals and superintendents have not only the right but the duty to make responsible and objective evaluations of their teachers and to report these evaluations not only to their current school board but also to prospective employers. However, the principal and superintendent do not have the right to slander or libel a person's good name or give negative information that is totally unrelated to job performance. There have also been cases where school board members, while sitting in a board meeting, have made defamatory comments about various teachers and administrators. The courts appear to be divided as to the liability incurred by school board members in such situations. Some courts feel that the school board in a bona fide school board meeting has a legislative purpose and is consequently immune from defamation charges. Other courts have stated that the school board member who makes defamatory statements unrelated to the purpose of the meeting should be held liable. Circumstances vary so much that no all-encompassing rule can be established regarding liability of an individual school board member in a defamation of character suit. However, teachers who have experienced such situations may find relief under the federal statute discussed in footnote nine of Chapter I.

Cases

While defamation of character is a type of tort case that receives special attention in the press, there are not a great number of such cases in education. And most of these that have actually gone to court seem to have been won by the educators involved.

Suits against parents. There are a number of cases where educators have decided that it was necessary to sue parents of pupils or other members of the community. In *Sewell* v. *Brookbank* (581 P. 2d 267, 1978) a high school chemistry teacher was allegedly defamed by the parents of his pupils at a school board meeting. Parents of several pupils in Albert Sewell's chemistry class were concerned about their children's performance in class. The parents went to the principal with seven complaints about the teacher. The principal asked Sewell to respond to the parents' charges in writing. He did so. The parents, not satisfied, met with the division superintendent. Again, nothing happened. So the parents presented their grievances at an open school board meeting. Sewell, brought suit against the parents for defamation of character. The court held that parents enjoy conditional-privilege communication while at school board meetings and that before defamation charges can be upheld, the teacher must show that the statements are false and are made with malice intent. The court held that a teacher's denial of allegations does not make them untrue. In this case the court ruled in favor of the parents, stating:

> If we were to hold otherwise, then once the teacher denies any allegation of incompetency even though the adequacy of his answers are still in question, the matter is ended. We cannot condone such a result, which would allow school officials to shield the incompetent teacher and thus defeat the legitimate interest of the parents in their children and the school system.[7]

In another case involving a suit by a teacher against parents, the court ruled that letters from parents to principals enjoyed at least conditional privilege and perhaps absolute privilege. In *Martin* v. *Kearney* (124 Cal. Rptr. 281, 1975) a high school typing teacher brought a defamation suit against parents who complained, in writing, regarding her capabilities as a teacher. The court record says:

> The letters...stated that Martin had displayed an utter lack of judgment or respect, had been rude, vindictive, and unjust, misused her authority and had given failing grades to students she did not like. One letter stated, "We are sending you this information...in the hope that either Miss Martin is able to correct her personality defects (with or without professional assistance) or in the future will teach adults who perhaps can cope with her problems."[8]

The court found in favor of the parents, stating:

> We do not intend to suggest that privilege attaches to every libel of a public school teacher or administrator.... But in this case parents of school children were seeking redress against their children's teacher through appropriate school channels. One of the crosses a public school teacher must bear is intemperate complaint addressed to school administrators by overly-solicitous parents concerned about the teacher's conduct in the classroom. Since the law compels parents to send their children to school, appropriate channels for the airing of supposed grievances against the operation of the school system must remain open.[9]

Recently a high school assistant principal lost a case involving a defamation suit that he brought against two pupils' parents, *Brody* v. *Montalbane* (151 Cal. Rptr. 206, 1979). In this case the two pupils physically harmed a third pupil while in school. Eugene Brody, the school's assistant principal, had the two boys arrested and suspended them from school. The parents sent a letter to the school board complaining of Brody's treatment of their children. Brody filed suit, alleging libel. The court held that the communication between the parents and the school board is privileged. The court held for the parents, quoting an earlier decision:

> To accomplish the purpose of judicial or quasi-judicial proceedings, it is obvious that the parties or persons interested must confer and must marshal their evidence for presentation at the hearing. The right of private parties to combine and make presentations to an official meeting and, as a necessary incident thereof, to prepare materials to be presented is a fundamental adjunct to the right of access to judicial and quasi-judicial proceedings. To make such preparations and presentations effective, there must be an open channel of communication between the persons interested and the forum, unchilled by the thought of subsequent judicial action against such participants; provided always, of course, that such preliminary meetings, conduct, and activities are directed toward the achievement of the objects of the litigation or other proceedings.[10]

In *Schulze* v. *Coykendall* (545 P. 2d 392, 1976) a principal sued a pupil's parents for libel and slander after they presented a list of charges against the principal at a school board hearing. The trial court dismissed the suit and the principal appealed. The Kansas appellate court upheld the dismissal of slander suit because the principal could not document who said what and when. However, the appellate court ordered a new trial on the libel charges, since there appeared to be evidence that the parents knew that the charges against the principal were false and that such material was presented at a school board meeting with malice aforethought with the intent to harm the principal. Regarding the issue of privileged communication, the court said:

> Owing to the public nature of the teaching profession, a teacher is not entirely exempt from criticism, and comments concerning a teacher's professional life are regarded as qualifiedly or conditionally privileged. A public school teacher is considered to be in the area of public employment. There is a public interest involved in school matters and patrons have a common interest and duty in the premises. Acting in good faith, they may petition a school board relating to the qualifications and tenure of a public school teacher, and the preparation and filing of the complaint enjoys a qualified privilege.[11]

Suits concerning personnel matters. There are several well-known cases in the defamation area concerning evaluation of personnel. In these cases an educator usually brings suit against superiors, alleging defamation of character resulting from negative evaluations.

In *McGowen* v. *Prentice* (341 So. 2d 55, 1977) Jo Ann McGowen, a high school teacher, sued her principal for $250,000 in damages for defamation of character. The principal had recommended to the school board that McGowen not be rehired. The trial court found no defamatory statements, and the appellate court agreed. McGowen also alleged that the principal referred to her as being "nuts" in front of other teachers in the teachers' lounge. The appellate court stated:

> The trial court held, considering the circumstances of the remark, that it did not constitute a defamatory statement. The trial court noted that casual remarks made in informal conversation, even if they include the unflattering words, do not constitute actionable defamation. We agree with the analysis of the trial court.[12]

Therefore, all charges against the principal were dismissed.

In a similar case, *Cioffi* v. *Giannone* (391 N.Y.S. 2d 675, 1977) a New York court ruled against a teacher who filed defamation suits against her assistant principal and department head for issuing poor evaluations of her performance.

Puckett v. *McKinney* (373 N.E. 2d 909, 1978) is a similar case from Indiana. Clara Puckett was a teacher under the supervision of Robert McKinney, the principal of a school. Puckett alleged that McKinney purposefully denied her sufficient teaching supplies, materials, textbooks, steel cabinets, reading readiness tests, etc., which affected her performance in the classroom. After listening to such accusations throughout the school year, McKinney informed the school board that Puckett was "emotionally disturbed" and recommended nonrenewal of her contract. The school board acted favorably on this recommendation and informed Puckett of the nonrenewal. Puckett immediately sued in court, claiming defamation of character and slander.

Puckett presented her evidence before the trial court. Evidence was also admitted, without objection, establishing McKinney's duty to evaluate teachers and to make recommendations to the school board regarding their continued employment. At the end of Puckett's evidence, the defense for McKinney rested without presenting evidence and tendered a motion for judgment on the evidence. The jury found that statements made by a principal to the school board in evaluation of a teacher are "protected by privilege and that burden is placed on the plaintiff (the teacher) to introduce evidence of malice to defeat the privilege."[13] The principal won the case.

Another interesting case is ***Williams*** v. ***School District of Springfield*** R-12 (447 S.W. 2d 256, 1969), in which a teacher brought suit against the superintendent for defamation of character. The teacher alleged that the superintendent "willfully, wantonly, and maliciously spoke and caused to be spoken and published false, defamatory, and slanderous words [accusing the teacher of having] disobeyed school rules and regulations; [being] insubordinate and [being] insufficient and inadequate with her students."[14] The offending statements were made at the teacher's nonrenewal hearing before the school board. The court held that superintendents enjoy absolute-privilege communication at board meetings:

> As we have said, a ***qualified*** privilege is lost if the publication is made maliciously or in the wrong state of mind. But that is not true of an ***absolute*** privilege. In cases of absolute privilege the utterer is absolutely immune from responsibility without regard to his purpose or motive, the reasonableness of this conduct, or malice. Since we have decided that defendant had an absolute privilege, the contention of plaintiff that he abused the privilege is not applicable. When plaintiff asked the defendant at the board meeting why she was not going to be reemployed the following school year, the superintendent should be at liberty to say to her, "Miss Williams, you have disobeyed school rules and regulations, you are insubordinate and are insufficient and inadequate with your students." In that situation he is absolutely protected in his explanation to plaintiff.[15]

In ***Lipman*** v. ***Brisbane Elementary School District*** (11 Cal. Rptr. 97, 1961), a district-level superintendent sued the district trustees (school board) both as a body and as individuals, as well as the county superintendent and district attorney, for defamatory statements made during and after a board meeting. The Supreme Court of California ruled that the trustees were immune from suit while in session, but defamatory statements made to the press after the meeting were actionable, saying:

> A different situation, however, is presented by the allegations that the trustees made statements to various persons including newspaper reporters and members of the public to the effect that plaintiff suppressed facts from the board, tampered with minutes of board meetings, received "kickbacks" from district employees, engaged in "shady dealings," and "cleaned up" on business transactions involving the district.

> False statements of this type are clearly defamatory..., and they would obviously make it difficult and burdensome for plaintiff to perform her contractual obligations. The statements allegedly made to the press and to members of the public were not confined to reports of charges that were being made; they purported to be statements of fact and were beyond the scope of the trustees' powers. In making these statements the three trustees were not within the immunity rule.[16]

The court also allowed the defamed district superintendent to ammend her suit against the county superintendent and district attorney to show malice and, thereby, negate any qualified privilege.

Schulzen v. *Board of Education of School District Number 258* (559 P. 2d 367, 1967) is a similar case involving a principal in a Kansas school district. After a school board hearing, a letter of reprimand was placed in the principal's personnel file. The principal sued the school board for defamation of character. The Kansas court held that the school board was acting in a "quasi-judicial" function and therefore enjoyed judicial absolute immunity.

Another interesting case is ***Stukuls*** v. ***State of New York*** (397 N.Y.S. 2d 740, 1971). A college professor sued for discovery (a legal technique where the professor is allowed to see administration documents) regarding his failure to obtain tenure. The professor claims that the vice president of the university read an unconfirmed letter to the personnel committee alleging that the professor had an affair with a student. The professor claimed that the vice president was guilty of defamation, since he made no attempt to check or verify the letters. The New York court agreed with the professor.

In ***Frisk*** v. *Merrihew* (116 Col. Rptr. 781, 1974) an attorney who was representing a teacher at a school board budget hearing brought suit against the district superintendent after the superintendent made a derogatory and defamatory statement to the attorney. The California Supreme Court ruled that whether or not a "special school board meeting on the budget" possessed absolute privilege (as did regular meetings) was an issue for a jury to decide.

Suits brought by students and/or parents. In several well-known cases students or their parents have sued educators for breaching confidentiality of information. ***Vigil*** v. ***Rice*** (397 P. 2d 719, 1964) is a classic case. Cynthia Vigil, a 13-year-old female, went to her family physician for treatment of an infected foot. The treatment necessitated her staying home for an extended period of time. Consequently, a homebound teacher was requested. The school sent medical forms to the physician. The physician returned the forms to the school, stating that Vigil was pregnant. Vigil's parents, having learned of the mix-up, attempted on several occasions to get the physician to correct the error. It was never corrected. Nasty letters and nonpayment of bills ensued. Finally Vigil's parents brought suit against Rice, the physician, for defamation of character. The jury awarded Cynthia $2,000 in compensatory damages and $5,000 in punitive damages. Rice appealed and the Supreme Court of New Mexico upheld the suit and the damages, stating:

> It has been held that the refusal to make a correction, after having been apprised of its falsity, is evidence which tends to show malice or bad faith on the part of the defendant in making the publication.... We hold that evidence to show the defendant's refusal to retract is permissible to show malice. We have reviewed the record and find that the evidence is substantial to support and warrant a finding by the jury that actual malice was present, and we shall not reverse that finding.[17]

Wynne v. *Orcutt Union School District* (95 Cal. Rptr. 458, 1971) is a sad case, but perhaps a significant one. Martin Wynne, an elementary student, was suffering from a terminal disease. While he was unaware of this fact, the parents told the teacher about it. The teacher told some of Martin's classmates, who then told Martin. Martin's parents brought suit, alleging violation of confidential information by the teacher. The court held that there was no breach of confidentiality, ruling as follows:

> Betty Wynne merely informed Martin's teacher "in strict confidence" of Martin's disease, and the complaint says nothing about the teacher's request for information or about any promise of hers not to reveal it to others. Subsequent characterization of a conversation as confidential cannot create a retrospective duty of concealment not assumed at the time.[18]

In *Blair* v. *Union Free School District Number 6, Hauppauge* (324 N.Y.S. 2d 222, 1971) a pupil and his parents divulged some information to school authorities that was passed on to police officials. School authorities also leaked this information to the press. Judith Blair sued, alleging violation of a confidential relationship. A New York court ruled that whether the school authorities violated a confidential relationship is a matter for a jury to address. In its decision, however, the court addressed the special relationship between a pupil and school authorities as follows:

> The case at bar ...is not the normal situation relating to infliction of mental distress, since the complaint alleges a fiduciary relationship. Although the relationship of a student and a student's family with a school and its professional employees probably does not constitute a fiduciary relationship, it is certainly a special or confidential relationship. In order for the educational process to function in an effective manner, it is patently necessary that the student and the student's family be free to confide in the professional staff of the school with the assurance that such confidences will be respected. The act of the school or its employees in divulging information given to a school in confidence may well constitute outrageous actionable conduct in view of the special or confidential relationship existing between a student and his family, and the school and its professional employees.[19]

Suits brought by the public. There are several interesting cases in which citizens have brought suits against school districts and their employees. One such case is *Chapman* v. *Furlough* (334 So. 2d 293, 1976). A parent came to Godly High School looking for his son. When it was discovered that the boy was not on school property, an athletic coach agreed to help the parent hunt for the boy. The coach took the parent to an alleged "dope house" during the search. An assistant principal later confirmed that the "Snack Shop" was indeed a dope house. Upon learning that his business establishment was being referred to as a "dope house" by school authorities, the proprietor sued, alleging defamation of character. While the Florida court that presided would not extend absolute privilege to the teacher or assistant principal, it did extend conditional privilege to their communications with the parent. Since conditional privilege requires proof of malice and there was no evidence of malice, the case was dismissed. The court said:

> The evidence is uncontroverted that the communications by Daniels and Furlough were made in good faith, they were made with reference to matters in which Daniels and Furlough had a duty, they were made to a parent who had a corresponding interest, they were made on occasions which properly served their duty, and they were made under circumstances fairly warranted by the occasion.[20]

In *Carter* v. *Pfannenenschmidt* (467 S.W. 2d 777, 1971) a minister sued the chairman of the Jefferson County Board of Education for making the following statement at a school board meeting: "John E. Carter has the vilest mouth of anyone I have ever heard and I have lost all respect for him."[21]

The presiding Kentucky court dismissed the suit, basing its dismissal on the state's sovereign immunity statute.

Summary

From the variety of cases presented above, at least a couple of general rules regarding defamation of character cases can be gleaned.

School boards enjoy absolute immunity during school board meetings. However, press conferences and discussions with citizens after the meeting do not enjoy such absolute privilege. During school board meetings, statements made by superintendents also seem to be protected by absolute privilege.

Statements by other administrators, teachers, or the public at school board meetings enjoy a conditional privilege. This privilege is intact if there is a duty to issue such statements, a belief in the truth of the statements, and no intent to harm or act out of malice. Indeed, even criticism of a teacher or administrator by the public is protected at school board meetings.

The issuing of negative recommendations or negative evaluations is not generally ruled as defamation. Some courts have held such actions to be a duty of administrators. In the *Rude* v. *Nass* case the court said:

> Where a person is so situated that it becomes right in the interests of society that he should tell to a third person facts, then, if he *bona fide* and without malice does tell them, it is a privileged communication.[22]

In *Hett* v. *Ploetz* (121 N.W. 2d 270, 1963), the court said:

> It is clear the Ploetz's allegedly defamatory letter was entitled to a conditional privilege. Ploetz was privileged to give a critical appraisal concerning his former employee so long as such appraisal was made for the valid purpose of enabling a prospective employer to evaluate the employee's qualifications. The privilege is said to be "conditional" because of the requirements that the declaration be reasonably calculated to accomplish the privileged purpose and that it be made without malice.[23]

The exact status of confidentiality between educators and students/parents is uncertain. If there is a conscious attempt by the pupils or parents to make such information confidential, then the confidential relationship probably does exist. On the other hand, such information is not confidential if there is no conscious attempt to make it so.

Defamation of Character

Teachers should be careful when writing comments in pupil records. Any statements that can keep a pupil from obtaining employment might be held libelous by the courts.

Notes

1. William L. Prosser, *Law of Torts, 4th ed.* (St. Paul, Minn.: West Publishing Co., 1971), p. 737.
2. Family Educational Rights and Privacy Act of 1974, PL 93-380.
3. *Law of Torts, 4th ed.*, p. 739.
4. Aryeh Neier, *Dossier: The Secret Files They Keep on You* (N.Y.: Stein and Day, 1975), p. 17.
5. Ibid., p. 18.
6. *Rude* v. *Nass* 48 N.W. 555 (1891).
7. *Sewell* v. *Brookbank* 581 P. 2d 267 (1978).
8. *Martin* v. *Kearney* 124 Cal. Rptr. 281 (1975).
9. Ibid.
10. *Brody* v. *Montalbane* 151 Cal. Rptr. 206 (1979).
11. *Schulze* v. *Coykendall* 545 P. 2d 392 (1976).
12. *McGowen* v. *Prentice* 341 So. 2d 55 (1977).
13. *Puckett* v. *McKinney* 373 N.E. 2d 909 (1978).
14. *Williams* v. *School District of Springfield R-12* 447 S.W. 2d 256 (1969).
15. Ibid.
16. *Lipman* v. *Brisbane Elementary School District* 11 Cal. Rptr. 97 (1961).
17. *Vigil* v. *Rice* 397 P. 2d 719 (1964).
18. *Wynne* v. *Orcutt Union School District* 95 Cal. Rptr. 458 (1971).
19. *Blair* v. *Union Free School District Number 6, Hauppauge* 324 N.Y.S. 2d 222 (1971).
20. *Chapman* v. *Furlough* 334 So. 2d 293 (1976).
21. *Carter* v. *Pfannenenschmidt* 467 S.W. 2d 777 (1971).
22. *Rude* v. *Nass* 48 N.W. 555 (1891).
23. *Hett* v. *Ploetz* 121 N.W. 2d 270 (1963).

VIII

Educational Malpractice

A brand new kind of tort is quickly evolving in education: "educational malpractice." As in medical malpractice, the term derives from negligence on the part of the practitioner.

There are two major types of educational malpractice suits, those arising from education for the handicapped and those based on incompetence of school graduates.

Section 504 of the 1973 Rehabilitation Act (PL 93-380) and the federal Education for All Handicapped Children Act (PL 94-142) have generated many suits of the first type. Basically, these suits are concerned with some aspect of educating the handicapped child. They usually involve failure to treat a pupil who has some handicapping condition, the nondiagnosis of a handicapping condition, misdiagnosis, or mistreatment of the handicapping condition. Other suits involve architectural barriers to handicapped pupils, such as buildings without elevators, buildings where steps but no ramps are supplied, classroom doors that are too narrow for wheelchairs, restroom facilities that will not accommodate persons in wheelchairs, water fountains unsuited to handicapped persons, and generally inaccessible physical facilities. There is considerable litigation in this area, with several important cases recently adjudicated.

The other major type of malpractice suit—the competency suit—is brought by pupils or their parents against teachers or school districts for failing to provide an adequate quality of instruction. The typical case involves a pupil who receives a high school diploma, yet is unable to acquire a meaningful job because he or she is functionally illiterate. These pupils allege that holding a high school diploma suggests competency at least adequate to survive in our society. But the pupil with no appreciable reading or writing skills may not be able to survive. So the pupil sues the school district and sometimes the teachers for educational malpractice, claiming that he or she did not receive proper instruction in the fundamentals of education.

Related to the new competency suits is the trend in education toward minimum competency testing. Many states now require pupils to pass a minimum competency test for the high school diploma. Pupils who cannot pass the test may sue the school district, alleging that the schools did not provide them with proper instruction for passing the test.

Since malpractice is a very new area of educational tort law, it is very difficult to draw any conclusions regarding the relatively few cases on the record. One thing is certain, however. Competency suits and handicap and education suits will continue and will flourish. They may replace the physical injury suit as the biggest threat to education from the area of tort law.

Competency Suits

Competency-type malpractice suits seem to have the potential for creating the most litigation in this new tort area of education. Once the door opens, an avalanche of litigation will probably ensue, with founded as well as unfounded actions. If every pupil who fails to master all of the survival skills of society should bring suit against his school district and its teachers for educational malpractice, the country's courtrooms would be immediately overwhelmed.

The first of the major competency malpractice cases was *Peter W.* v. *San Francisco Unified School District* (60 C.A. 3d 814, 131 Cal. Rptr. 854, 1976). Peter W. graduated from the San Francisco schools with a high school diploma. A California statute requires that high school graduates read at a level above the eighth grade.[1] Apparently Peter W. could not survive in society, because he lacked reading or writing ability. He sued the San Francisco Public Schools on five counts. Peter alleged that the public schools:

1. "Negligently and carelessly" failed to apprehend his reading disabilities.
2. "Negligently and carelessly" assigned him to classes in which he could not read "the books and other materials."
3. "Negligently and carelessly" allowed him "to pass and advance from a course or grade level" with knowledge that he had not achieved either its completion or the skills necessary for him to succeed or benefit from subsequent courses.
4. "Negligently and carelessly" assigned him to classes in which the instructors were unqualified or which were not "geared" to his reading level, and,
5. "Negligently and carelessly" permitted him to graduate from high school although he was "unable to read above the eighth-grade level, as required by Education Code 8573...thereby depriving him of additional instruction in reading and other academic skills."[2]

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Peter W. was seeking general damages, because of his "permanent disability and inability to gain meaningful employment,"[3] and specific damages to compensate him for tutoring to correct the injury which San Francisco schools had inflicted upon him.

The California Court of Appeals affirmed the superior court's dismissal of the suit against the school district. The affirmation was decided on three points. First, the court held that public policy controls whether the school owes a "duty of care" to their pupils, and the justices felt that public policy would not allow this type of duty to exist. The court said:

> To hold [the schools] to an actionable "duty of care," in the discharge of their academic functions, would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation.[4]

Second, the court held that this type of tort suit is unmanageable by the judiciary. There is no conceivable legalistic manner in which to handle such tort actions. Here is how the court put it:

> On occasions when the Supreme Court [of California] has opened or sanctioned new areas of tort liability, it has noted that the wrongs and injuries involved were both comprehensible and accessible within the existing judicial framework. This is simply not true of wrongful conduct and injuries allegedly involved in educational malfeasance. Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject. The "injury" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, is influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.[5]

Finally, the California Court of Appeals felt that there was no "misrepresentation" of the pupil's progress, either intentionally or negligently. And even if there were, public policy would not allow such actions. The court said, "For the public policy reasons heretofore stated with respect to plaintiff's first count, we hold that this one states no cause of action for *negligence* in the form of the "misrepresentation" alleged.[6]

Therefore, the California court ruled against the pupil and for the school district in education's first "competency" malpractice suit.

Less than two years later the second important competency malpractice case was decided 3,000 miles away from California. The New York Supreme Court, Appellate Division, also ruled against a pupil alleging educational malpractice in *Donohue* v. *Copiague Union Free School District* (407 N.Y.S. 874, 2d 64 A.D. 2d 29, 1978). In this case Edward Donohue sought $5,000,000 in damages, making two allegations. First, his lawyers claimed that the public schools failed to "teach the several and varied subjects to plaintiff, ascertain his learning capacity and ability, and correctly and properly test him for such capacity in order to evaluate his ability to comprehend the subject matters of the various courses and have sufficient understanding and comprehension of subject matters in said courses as to be able to achieve sufficient passing grades in said subject matters, and therefore, qualify for a Certificate of Graduation."[7]

Since Donohue did not have basic skills in reading and writing, the suit claimed that the school system breached its "duty of care" because it "...gave to the plaintiff passing grades and/or minimal or failing grades in various subjects; failed to evaluate the plaintiff's mental ability and capacity to comprehend the subjects being taught to him at said school; failed to take proper means and precautions that they reasonably should have taken under the circumstances; failed to interview, discuss, evaluate and/or psychologically test the plaintiff in order to ascertain his ability to comprehend and understand such subject matter; failed to provide adequate school facilities, teachers, administrators, psychologists, and other personnel trained to take the necessary steps in testing and evaluation processes insofar as the plaintiff is concerned in order to ascertain the learning capacity, intelligence, and intellectual absorption on the part of the plaintiff; failed to hire proper personnel...; failed to teach the plaintiff in such a manner so that he could reasonably understand what was necessary under the circumstances so that he could cope with the various subjects....; failed to properly supervise the plaintiff; [and] failed to advise his parents of the difficulty and necessity to call in psychiatric help.[8]

The New York court, using the *Peter W.* case as precedent, also claimed that public policy does not allow the judiciary to become embroiled in education affairs. The court said:

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> Simply stated, the recognition of a cause of action sounding in negligence to recover for "educational malpractice" would impermissibly require the courts to oversee the administration of the state's public school system.
>
> Accordingly, we hold that the public policy of this state recognizes no cause of action for educational malpractice.[9]

The court also felt that the process of education is a two-step process. First, there must be teaching, and second, there must be learning. The court was *not* willing to conclude that when a pupil does not learn it is automatically the fault of the teacher. The court put it this way:

> The failure to learn does not bespeak a failure to teach. It is not alleged that the plaintiff's classmates, who were exposed to the identical classroom instruction, also failed to learn.[10]

The court placed a certain amount of the burden of fault on the pupil himself and on his parents as well:

> The grades on the plaintiff's periodic report cards gave notice both to his parents and himself that he had failed in two or more subjects, thus meeting the definition of an "underachiever" provided in the regulations of the Commissioner of Education (8 NYCRR 203.1 /2/). Having this knowledge, the plaintiff could properly have demanded the special testing and evaluation directed by the statute.[11]

But since neither the pupil nor the parents requested special help, the court felt that they could not blame failure to learn on the school system or its teachers.

There is one vital difference between the *Peter W.* and the *Donohue* decisions. The New York Supreme Court, Appellate Division, did not completely rule out future malpractice suits. Indeed, the court suggested that if more than a single individual suffers injury as a result of educational malpractice, a negligence suit might be successful:

> This determination does not mean that educators are not ethically and legally responsible for providing a meaningful public education for the youth of our State. Quite the contrary, all teachers and other officials of our schools bear an important public trust and may be held to answer for the failure to faithfully perform their duties. It does mean, however, that they may not be sued for damages by an individual student for an alleged failure to reach certain educational objectives.[12]

Competency malpractice suits also occur in two other situations. Pupils have successfully challenged the state's alleged right to require some cutoff score as a minimal competency test in order to receive their diplomas. *Debra P.* v. *Turlington* (474 F. Supp. 244, 1979) is such a case. Under Florida law, pupils who fail the state's "functional literacy test" were not to be awarded a diploma. Instead, a certificate of attendance would be given to the pupil. Debra P. and nine other pupils failed the test and sued the state, alleging that Florida was denying them their property rights without due process of law as required under the Fourteenth Amendment to the Constitution. A United States district court (Middle District, Florida) agreed with the pupils' contention and ordered the state to issue diplomas to all pupils who meet graduation requirements (excluding the functional literacy test) until 1983. Interestingly enough, the court's requirement will hold school districts immune from malpractice suits. The school districts and the state are simply obeying a court order.

Two interesting teacher dismissal cases have ominous overtones for the future if such malpractice suits ever become a successful trend. *Scheelhaase* v. *Woodbury Community School District* (349 F. Supp. 988, Reversed 488 F. 2d 237, 1973) involved a teacher contract nonrenewal because of low scores made by the teacher's pupils on standardized tests. Scheelhaase's contract was not renewed because of her pupils' poor performance on the Iowa Basic Skills Tests and the Iowa Test of Educational Development. The trial court ruled in favor of Scheelhaase, accepting her argument that pupil performance on standardized tests is not a valid indicator of teaching competency. However, the U.S. Court of Appeals for the Eighth Circuit reversed the trial court's ruling. The circuit court accepted the school system's proposition that below-average performance on standardized tests by Scheelhaase's pupils was sufficient reason not to renew her contract.

Another teacher dismissal case with implications for the competency malpractice area is *Gilliland* v. *Board of Education* (365 N.E. 2d 322, 1977). An Illinois school board dismissed a tenured elementary teacher because she had "ruined the students' attitudes toward school, had not established effective student/teacher rapport, constantly harassed students, habitually left her students unattended, and gave unreasonable and irregular homework assignments."[13]

With more and more states implementing minimal competency tests as prerequisites for receiving a diploma (16 states have passed some kind of legislation[14]), there is only one thing certain in the future. There will be more and more attempts by pupils to recover damages as a result of educational malpractice.

Handicapped Student Suits

The militant activism by handicapped pupils and their parents in the 1970s resulted in numerous suits in the area of handicapped education in almost every state in the country. But such suits were aimed more toward gaining access to a free, public education than toward educational malpractice.

However, two events may open the floodgates of litigation on educational malpractice suits involving handicapped pupils. The first event was the passage of PL 94-142 in 1975. This federal law insures the rights of all handicapped pupils to a "free and appropriate education." Malpractice suits can derive from arguments over what constitutes an appropriate education and how it is to be provided. Thousands of suits have already been filed by pupils and parents as a result of PL 94-142 implementation. However, most of these suits are not thus far truly malpractice suits.

The second significant event that brought handicapped education into the area of malpractice suits is a very important case in New York. *Hoffman* v. *Board of Education of City of New York* (64 A.D. 2d 369, 410 N.Y.S. 2d 499, 1978, Reversed 400 N.E. 2d 317, 49 N.Y.S. 2d 121, 1979) is the first major case—and a landmark case it is—in the handicapped malpractice area.

Daniel Hoffman, born in April 1951, was taken to the National Hospital for Speech Disorders when he was almost five years old. Because of his severe speech defect, the hospital conducted a series of tests, including a nonverbal IQ test (Merrill-Palmer). The court reported:

> Plaintiff scored an IQ of 90, with a mental age of 4 years and 5 months, as against his actual age of 4 years and 11 months. This was within the range of normal intelligence.[15]

In 1956 Hoffman entered kindergarten in the New York City schools. A certified clinical psychologist tested him using the Stanford-Binet Intelligence Test, which is primarily verbal. Because of his speech defect, Hoffman did not do well on the IQ test. He scored 74, one point below the "borderline intelligence" range. Hoffman was placed in a special education class. However, the clinical psychologist did recommend that "his intelligence should be reevaluated within a two-year period."[16] Unfortunately, Hoffman was dropped between the cracks of the school system; the reevaluation never took place. In his eleventh year with the school system, Hoffman was transferred to the Queens Occupational Training Center (OTC), where he was retested. He scored

94 on an IQ test, well within the "normal" range. Center officials planned to drop him from their program, because Hoffman was not retarded and therefore not eligible to remain at OTC.

Neither Hoffman nor his mother ever questioned his previous testing, because for 12 years they had been told by school authorities that he was retarded. An independent neurologist and psychiatrist confirmed the OTC's findings. However, the psychiatrist testified that even though Hoffman was not retarded, he would continue to act so, because for 12 years he had been *told* that he was retarded and was treated as such. The court record reads:

> If (one) is treated as a mentally retarded patient, a person who cannot learn or cannot do something that normal children are doing, he assumes in the long run that that's the role that he should be playing in life, and so this diminishes his incentive and diminishes the capacity to learn....when one is told he is not retarded after 13 years of being considered otherwise, one cannot then simply go out and say, "Now I am not retarded. I am going to conquer the world or do something."[17]

In 1977 Daniel Hoffman filed suit against New York City schools for educational malpractice. The schools claimed that Hoffman *was* "reevaluated" at least every year by his teacher (note: "reevaluated, not "retested"). A New York jury found the school system guilty of negligence and the New York Supreme Court's trial term judge awarded damages of $750,000. The Board of Education of the City of New York appealed the case to the New York Supreme Court, Appellate Division.[18] That court sustained the finding of negligence, stating:

> On the facts in this record, we need not reach the question of whether plaintiff's teachers, on their own, should have recommended IQ testing or whether plaintiff's mother was remiss in not requesting it (or, and more to the point, whether defendant was remiss in not advising plaintiff's mother that she had the right to make such a request, in which case it would be granted), since it is not necessary to go any further than to note that the school psychologist's recommendation was totally ignored.[19]

The court felt that malpractice as performed in this case was similar to medical malpractice:

> Had plaintiff been improperly diagnosed or treated by medical or psychological personnel in a municipal hospital, the municipality would be liable for the ensuing injuries. There is no

> reason for any different rule here because the personnel were employed by a government entity other than a hospital. Negligence is a negligence, even if defendant and Mr. Justice Damiani prefer semantically to call it educational malpractice.[20]

In spite of the loud protestations of the school division, the Supreme Court, Appellate Division, felt that justice must be done:

> Therefore, not only reason and justice, but the law as well, cry out for an affirmance of plaintiff's right to a recovery. Any other result would be a reproach to justice. In the words of the ancient Romans: *Fiat justitia, ruat coelum* (Let justice be done, though the heavens fall). However, the verdict should be reduced to $500,000.[21]

Again the Board of Education of the City of New York appealed the case, this time to the New York Court of Appeals.[22] That court reversed the findings of the lower courts, dismissing the suit against the school division. It based the reversal on the *Donohue* case,[23] which it had decided only a year earlier. The court felt that educational matters should be handled by educators, not judges or juries:

> We had thought it well settled that the courts of this State may not substitute their judgment, or the judgment of a jury, for the professional judgment of educators and government officials actually engaged in the complex and often delicate process of educating the many thousands of children in our schools.... Indeed, as we have previously stated that the courts will intervene in the administration of the public school system only in the most exceptional circumstances involving "gross violations of defined public policy".... Clearly, no such circumstances are present here. Therefore, in our opinion, this court's decision in *Donohue* is dispositive of this appeal.[24]

After appeals, the final *Hoffman* decision, like decisions in previous malpractice cases, was a victory for the school district. When the decision was issued by the New York Court of Appeals, many educators optimistically hoped that it would slam the door on educational malpractice cases. The reality was different. Even though the major malpractice cases (*Peter W.*,[25] *Donohue*,[26] and *Hoffman*[27]) were all won by educators, such suits will continue until one is won because of blatant and gross negligence of a school division. Then the floodgates on educational malpractice litigation will open wide.

Another less known and less important case that is closer to malpracice than to "injury" type negligence cases is *Bogust* v. *Iverson* (228 N.W. 2d 228, 1960). Raymond Bogust, a director of counseling at Stout State College, was working with a female student who appeared to have some serious emotional disorders. Bogust terminated counseling sessions with the student. Shortly afterward, the student took her own life.

The student's parents filed suit against Bogust, alleging, in essence, educational malpractice, although it was not called that. The trial court ruled in favor of Bogust, making a distinction between his "educational" background as opposed to a "medical" background: "To hold that a teacher who has had no training, education, or experience in medical fields is required to recognize in a student a condition the diagnosis of which is in a specialized and technical medical field would require a duty beyond reason."[28]

The Wisconsin Supreme Court upheld the finding of the trial court, stating that Bogust could not be held accountable for not securing psychiatric treatment for the student and/or notifying her parents about her condition if he had neither the background nor the training to make such a determination.

Summary

While the incidence of educational malpractice cases is not high, the potential definitely exists for much more litigation on the issue. A 1976 article in *The University of Pennsylvania Law Review* lists, step by step, the various methods by which malpractice suits can be brought against school districts.[29] While the excellent article is much too detailed to report here, some of its conclusions should not escape educators. The authors see present cases as difficult to win by pupils and their parents:

> At the present time, the problems involved in bringing a suit for failure to learn because of teacher negligence or incompetence may seem insurmoutable. Traditional legal principles, however, provide ample guidance for fashioning a viable cause of action.[30]

However, the authors conclude by citing William Prosser's wise words about flexibility of tort law:[31]

> ...[T]he progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before... The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the

plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to recovery.[32]

Notes

1. California Education Code s8573.
2. *Peter W.* v. *San Francisco Unified School District*, 60 C.A. 3d 814, 131 Cal. Rptr. 854 (1976).
3. Ibid.
4. Ibid.
5. Ibid.
6. Ibid.
7. *Donohue* v. *Copiague Union Free School District*, 407 N.Y.S. 2d 874, A.D. 2d 29 (1978).
8. Ibid.
9. Ibid.
10. Ibid.
11. Ibid.
12. Ibid.
13. Richard S. Vacca, "Competency Testing: Legal Implications" Paper presented at the Seventh Annual Conference *Legal and Policy Issues in Education* (Virginia Polytechnic University: Blacksburg, Va., 24 October, 1978).
14. Arelene H. Patterson, "Professional Malpractice: Small Cloud, But Growing Bigger," *Phi Delta Kappan*, 62 (November 1980), p. 194.
15. *Hoffman* v. *Board of Education of City of New York*, 410 N.Y.S. 2d 99, 64 A.D. 2d 369, 1978).
16. Ibid.
17. Ibid.
18. The Supreme Court, Appellate Division in New York, is a higher court than the Supreme Court, Trial Term.
19. *Hoffman* v. *Board of Education of City of New York*.
20. Ibid.
21. Ibid.
22. In New York, The Court of Appeals is a higher court than the Supreme Court, Appellate Division.
23. *Donohue* v. *Copiague Union Free School District*.
24. *Hoffman* v. *Board of Education of City of New York*.
25. *Peter W.* v. *San Francisco Unified School District*.
26. *Donohue* v. *Copiague Union Free School District*.
27. *Hoffman* v. *Board of Education of City of New York*.
28. *Bogust* v. *Iverson*, 228 N.W. 2d 228 (1960).
29. "Educational Malpractice," *The University of Pennsylvania Law Review* 124 (January 1976): 755-805.
30. Ibid., p. 803.
31. Ibid., p. 805.
32. William L. Prosser, *Law of Torts*, 4th ed. (St. Paul, Minn.: West Publishing Co., 1971), p. 3.

IX

Conclusion

As noted in the preface, this book is not intended to frighten educators, but hopefully it will raise their level of consciousness. Many educators routinely go about their duties without considering their liabilities or the relative safety of their various educational programs. This book is intended to bring these considerations to mind without paralyzing the educator with fear. Indeed, if the book has demonstrated anything, it should have pointed out that most courts will not find educators negligent unless there is utter disregard for pupil safety and well-being.

Perhaps the real key to teacher negligence suits lies in the two legal principles discussed in Chapter I. The level of supervision and the ability of a prudent person to "foresee" the potential for injury are the cornerstones of educational tort law. Was the level or supervision adequate for the particular activity? The courts have generally held that most teachers and administrators need to provide a general type of supervision. This means that such personnel need to be aware of dangerous situations generally, but have no duty to provide constant and unremitting supervision. This general supervision assumes that there are no situations that call for more intense supervision. The scope of an educator's supervision is not necessarily restricted to the four corners of the classroom either. Cases cited in Chapter III illustrate that teachers' and principals' areas of supervision move with them throughout the educational complex. The fact that teachers are not in the classrooms does not absolve them from providing supervision.

The issue of teacher absence from the classroom appears to be fairly well resolved. Most courts have held that teacher absence from the classrooms does not automatically constitute negligence. Teacher absence from the classroom is not necessarily assumed to be the proximate cause of the injury. The courts take other factors into account. The type of acitvity the pupils are engaged in, the age of the pupils, how far or how long the teacher will be away from the classroom, and (of course) if the accident or injury could have been foreseen by a prudent or reasonable person are all factors the courts examine before ruling on the teacher absence issue.

However, teacher absence from specific supervisional duties does frequently lead to negligence. When teachers are assigned to supervise the hallway, the lunchroom, the auditorium, playground, or pupil recess area, they should definitely be on duty. Administrators also need to consider the pupil/teacher ratios of these supervised areas. The older the pupils, or less dangerous the activity, the higher the ratios, and vice versa.

Teacher aides can be substituted for teachers in many situations. However, the aides should be given some kind of instruction pertaining to their supervisory duties. One day of inservice instruction should be adequate.

Generally, teachers are only liable for activities that go on in their own classrooms, activities they were assigned to supervise, or activities that occur in close proximity to the teacher's physical presence. Unlike the administrator, teachers are rarely held liable for the omissions and commissions of others. Administrators, however, are nearly always routinely sued along with teachers in tort suits. Usually, the principal is not found negligent unless he knew or reasonably should have known of a dangerous situation. As a case in Chapter IV illustrated, a principal can be held liable for scheduling classes in inappropriate facilities.

Administrators can also be held liable for the physical conditions of their schools. Unsafe conditions should be fixed as soon as possible. This particularly applies to broken or cracked glass, defective doors, and unsafe stairs. In order to insure maximum protection, administrators should routinely inspect all the areas under their control. Such routine inspections should be documented as well (see Chapters I and IV).

Dangerous conditions around playgrounds, recess areas, and athletic spectator stands should be identified and corrected. The courts are unwilling to allow the assumption-of-risk defense in cases where such dangerous conditions existed.

Of course, teachers of specialized classes are particularly vulnerable to tort liability suits. Special care should be taken at all times to insure that equipment is properly maintained and that pupils are given proper instruction. Numerous cases from the science/vocational area and the athletic area illustrate this point. Most courts hold teachers of specialized classes to a higher standard of care than the average classroom teacher. This higher duty exists because of the higher probability of injury. The higher the duty of care, the more constant and specific the scope of supervision.

Conclusion

The moral issue of corporal punishment is not addressed in this book. However, numerous cases are cited in Chapter VI to demonstrate how easily an overzealous educator can be sued for assault and battery. Special care must be taken to insure that punishment is not excessive or unnecessary. Also, many types of tort insurance will not protect against negligence suits arising from the administration of corporal punishment.

Most defamation of character suits involve adults. A teacher may attempt to sue his or her principal for poor recommendations concerning his or her teaching ability. The courts have held principals to be immune from such suits if there was a duty to provide the recommendation and if the recommendation was made in good faith. Also, many defamation cases concern educators suing citizens who allege negative things about them at school board meetings. Again, the courts have held such circumstances to enjoy conditional-privilege immunity from suit. However, if the citizen or citizens in question knowingly present false statements or even true statements with the specific intent to harm the educator, then conditional immunity is stripped away.

The newest type of tort suit in education is the malpractice suit. While thus far all malpractice suits have been won by educators, sooner or later one will be won by the plaintiff. When that happens, a flood of malpractice cases will probably ensue, threatening the foundations of the educational system. Many states have attempted to head off this threat by enacting "minimal competency" legislation of one type or another. However, even this process has been challenged by malpractice suits. The future will present some very interesting moments in educational malpractice litigation.

The research for this book and my own experience as a professional educator lead me to conclude that a great many educators are careless. Few, if any, educators ever intend for a pupil to be hurt; malice is seldom found in education. However, most educators never think about tort liability. It is a rather unpleasant topic, and most teachers and administrators would rather avoid it. Tort liability is mentioned as one alludes to a lightening bolt—as something that happens to someone else.

It is vital that educators become much more aware of their legal liability status. Such awareness will lead to better care of pupils. And that helps everyone: educators, pupils, and parents.

Appendix A

Table of Cases in Alphabetical Order

Albers v. Independent School District No. 302 of Lewis City, 487 P. 2d 936, 94 Idaho 342 (1971).

Ardoin v. Evangeline Parish School Board, 376 So. 2d 372 (1979).

Arnold v. Hafling, 474 P. 2d 638 (1970).

Baikie v. Luther High School South, 366 N.E. 2d 542 (1977).

Baird v. Hosmer, 347 N.E. 2d 533, 46 Ohio St. 2d 273 (1976).

Baker v. Owen, 395 F. Supp. 294 (1975), affirmed 423 U.S. 907 (1976).

Banks v. Terrebonne Parrish School Board, 339 So. 2d 1295 (1976).

Barr v. Bernhard, 562 S.W. 2d 844 (1978).

Becker v. Beaverton School District No. 48, 551 P. 2d 498 (1976).

Berg v. Merricks, 318 A. 2d 220 (1974).

Bertrand v. Rand-McNally, No. 76-1864-F, U.S.D.C. Springfield, Mass. (1980).

Blair v. Union Free School District No. 6, Hauppauge, 324 N.Y.S. 2d 222 (1971).

Bogust v. Iverson, 228 N.W. 2d 228 (1960).

Bouillon v. Harry Gill Company, 301 N.E. 2d 627 (1973).

Brackman v. Adrian, 472 S.W. 2d 735 (1971).

Brabatcek v. Millard School District, School District No. 17, 273 N.W. 2d 680, 202 Neb. 86 (1979).

Brody v. Montalbane, 151 Cal. Rptr. 206, 87 Cal. App. 3d 733 (1979).

Bush v. Oscada Area Schools, 250 N.W. 2d 759 (1977).

Bush v. Smith, 289 N.E. 2d 800 (1973).

Capers v. Orleans Parish School Board, 365 So. 2d 23 (1978).

Carr v. Wright, 423 S.W. 2d 521 (1968).

Carter v. Pfannenenschmidt, 467 S.W. 2d 777 (1971).

Carter v. Rand-McNally, No. 76-1864-F, U.S.D.C. Springfield, Mass. (1980).

Castro v. Los Angeles Board of Education, 126 Cal. Rptr. 537, 54 Cal. App. 3d 232 (1976).

Central School District No. 3 v. Insurance Company of North America, 391 N.Y.S. 2d 492 (1977).

Chapman v. Furlough, 334 So. 2d 293 (1976).

Chapman v. State of Washington, 492 P. 2d 607 (1972).

Chavez v. Tolleson Elementary School District, 595 P. 2d 1017 (1979).

Childs v. Dowdy, 188 S.E. 2d 638, 14 N.C. App. 535 (1972).

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